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Supreme Court, U.S.
F I L E D
APR 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE No. 86-1801

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

IRVIN JAMES HUNTZINGER, Sr.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Appeal From The

UNITED STATES CLAIMS COURT

Petition For:

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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362 pp

3. Whether the Court(s) below did err, in concluding that no issues of material fact existed in connection with whether Petitioner knew of or should have known of the existence of a cause of action on the present basis stated, including bias, as of his removal from active duty in 1960, given his denials and the documents first released to him in June 1979?

4. Whether the Court(s) below did err, in not ruling as a matter of law on the basis of documentary evidence and the presumption of administrative regularity, born of the then-extent regulations, that Petitioner neither knew, nor should have known, of the accrual of a cause of action on the bases now claimed, as of 1960, and therefore, that the statute of limitations was tolled until the release of documents to Petitioner in June 1979?

5. Whether the ABCMR did in err, arbritrary and capriciously deny set-aside "Fort Hood ERs" based on Staff

Opinions of DESPER; and denial reinstatement basis illegal, wrongful, and fraudulent separation based on the Staff JAG opinion "untimely filed" statute of limitations?

6. Whether the record contains such substantial and uncontraverted evidence of the breach of material Army Regulations, the existence of bias in the Inspector General and rating processes, the exertion of command influence, and the ex parte presentation of prejudicial information to an Army Action, Active Duty Annual Screening Board as a subterfuge to avoid a "for cause" elimination proceeding and its procedural trappings that Petitioner is entitled to a judgement in his favor as a matter of law?

7. That the Active Duty Board's revoke(ation) of Petitioner's Indefinate Service Agreement was improper, and before the board illegally basis of fraudulent "brief"; violation Order, Secretary Army Instruction's guidelines,

and Criteria that it is "null and void" thereby mandatory Petitioner be reinstated as prayed for?

8. That Department of the Army must comply with Orders, Secretary Army; Regulations, Federal Statute, and adhere to its published policies, and protect the citizen-soldier's constitutional "procedural due process: rights; NOR, respond to the Congress or Courts fraudulently, knowingly.

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No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

October Term, 1986

_____

IRVIN JAMES HUNTZINGER, SR.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

_____

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

_____

I

OPINION OF THE COURT BELOW

The United States Court of Appeals for the Federal Circuit affirmed the judgement of the United States Claims Court

MEMO: 1. All Appendix(s) references: (App) are contained in Plaintiff's "Brief" Appendix dated 4 April 1986. Attached Appendix (APX P-). 2. All references to: Incl ___TAB"__" are those documents submitted; by leave of the Judge (Yock), U.S. Cl Ct, and returned by Deputy Clk, Cl Ct; and submitted to this Supreme Court by letter of 26 March '86.

without written opinion but by adoption of the United States Claims Court opinion FILED OCT 23 1985 (Appeal No 86-798) UNPUBLISHED (APX P-003) reproduced (APX P-003). Petitioner made motion "Request Rehearing in Banc" FILED DEC 2, 1986 RULE 26 and 27 (APX P-005), denied by ORDER 8 Jan 1987 (APX P-001). A motion for publication entered with justification--effect upon military personnel in the need to file suit on separation for potential protection discovery-deposition rights for wrongs the government might have commited while in military service in violation of their published directives (APX P-028), denied (APX P-001).

The United States Claims Court (Case No 317-85 C) granted respondent "summary judgement" basis not timely filed six year statute of limitations (APX P-038), finding no error affirm(ed) by the United States Court of Appeals for the Federal Circuit. Case was dismissed. RUSCC 32(b). NOTED: "The material facts are not in dispute." Judgement (APX P-064). Motion

for "Reconsideration" (APX P-065), U.S. Claims Court denied (APX P-074).

Plaintiff's response to Defendant's Motion . for "summary judgement" is attached, pertinent, as substantially supportive of this case (APX P-075).

II

(Opinion of Administrative Agency below-B CMR)

The Respondent's Department Army (DA), Board for Correction (BCMR) considered Petitioner's case per MEMORANDUM OF CONSIDERATION dated 27 FEB 1985, attached (APX P-0129) with supporting Staff JAG opinion(s) dated: Cmt 2, 3 Nov 83 (APX P-146); Cmt 4, 3 Feb 1984 (APX P-148); Cmt 2, 3 Aug 1984 (APX P-149); and attached are Petitioner's Counsel Briefs dated: Sep 9, 1983 (APX P-157); Jan 13, 1984 (APX P-172); Jan 27, 1984 (APX P-177); Mar 30, 1984 (APX P-184); Nov 1, 1984 (APX P-191); and Jan 2, 1985 (APX P-205); with letter of transmittal BCMR Memo HQ DA-TAGO dated Mar 20, 1985 (APX P-21C),

acknowledged per letter dated 27 March 1985 containing appeal based on record of error in stated facts, including exception to alleged 2 Apr 1960 action by the DA-Active Duty Board (ADB) (APX P-212) consideration of Petitioner's letter "Request for Retention on Active Duty" dated 19 Mar 1960 (App P-92) disputed as not presented to ADB per brief of Jan 27, 1984 (APX P-177), as stipulated in CMT 5 OPMG, Chief Pers..regarding letter of 19 Mar 1960 "is being held in abeyance until"..(APX P-241) dated 22 Apr 1960, therefore could not be before the ADB; as further confirmed, no documents confirming such action were found by BCMR per letter dated 22 Jul 1985 (APX P-242) and DA-OTAG, USARCP&AC dtd 3 Jun 1985 (APX P-243)--another fraudulent act by DA-BCMR arbitrary and capricious denial of Petitioner's application. Examiner's report further conflicts with the administrative record of BCMR previous Examiner's Reports on set aside ER's Ft Hood/Promotion actions and, DA RCPC "MEMO

FOR RECORD 10 Jun 1969 (APX P-255) refer response to Senator Montoya; and, Letter to Senator Yarborough dated 26 Feb 1970 (APX P-257).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Federal Circuit (Appeal No. 86-798) FILED OCT 20, 1986, AFFIRMED: The United States Claims Court, Opinion, (Case No. 317-85 C), FILED OCT 23, 1985 granting "summary judgement" - six year statute of limitation of Respondent. Motion filed requesting "Rehearing in Banc" Rule 36 and 37, DENIED per ORDER JAN 8, 1987; Notice of Appeal FILED JAN 8, 1986.

JURISDICTION of Writ of Certiorari is INVOKED under RULE 17 .1. (a), (c), and .2.; and VIOLATION OF: Government Rules, Army Regulation(s): AR 15-6, 20-1, 135-173, 135-215, 600-31, 623-105, 640-98, and United States Code of Military Justice (USCMJ); and, Federal Statutes: 2 U.S.C. 60 Stat 831 Legislative

Reorganization Act of 1946; The White Charger Act of 12 JUL 1960 Stat 386, 395; 10 U.S.C. Sec 1552; and, 28 U.S.C. Sec(s) 1254, 1346(b), 1491, 1552, 2671, 2675 and 5706; and Federal Torts Claims Act; -- VIOLATIONS of "due process" right(s) guaranteed by the United States Constitution "Fifth and Fourteenth Amendments--with entitlement(s) protection: First, Fourth, Seventh, and Eighth thereof.

28 U.S.C. Sec 2403(a) may be applicable; copy served on the Solicitor General, DOJ, Wash., DC 20530.

CONSTITUTIONAL PROVISION

Petitioner was denied his "Procedural Due Process" pursuant to his guaranteed rights under the Constitution of the United States of America, First, Fourth, Fifth, Seventh, Eighth and Fourteenth Amendments.) (APX P-218).

STATEMENT OF THE CASE

I

"Brief--Introduction"

(background History)

Petitioner Irvin James Huntzinger, Born 6 June 1932, Hegins Pennsylvania, enlisted in the United States Army at the age of 14[2] at recommendation of his Commander, upon discovery of his true age at 15 (Discovery made thru his assignment as undercover (narcotics) assignment with Army CID) by background investigation for attendance at Army CID School. Without objection, after third enlistment attempt, Petitioner was granted waiver to remain in service, with proviso that he continued with his education and excellent/outstanding duty record, with reassignment to Okinawa. Separated age 17

[2] Petitioner enlisted due to "high patriot" duty (Brother had enl 7 mons prev and was on leave) procured his draft card (without his permission) and presented it, upon req for ID, to Recruiting NCO. This should clarify "innuendo(s)" by the Respondent, IG and BCMR, JAG opinion et.al.,--

upon return to US, expiration of service enlistment to attend Pennsylvania Institute of Criminology where he was enrolled as a correspondence student, for resident's attendance (Order change status attached APX P-222). Waiver was granted by HQs Department of the Army (Air Corps), the Adjutant General.

In June 1950, outbreak of Korean War Petitioner enlisted in Regular Army and volunteered for assignment in Korea. Assigned 3d Inf.--returned CONUS June 51 with pending application for CIC duty FECOM; upon notification of selection volunteered return to Korea for duty with CIC as Special Agent, after orientation course, assigned duty resident agent attached Marines in defense of river crossing, demarcation of peace talks. Subsequently rotated to HQs X Corps CIC Det--soon after assignment the Detachment lost all but 1 officer and he was assigned Detachment Adjutant & Supply Officer (All agents were in Officer status).

Petitioner was commissioned on basis

of demonstrated leadership as a (SFC) Staff Sergeant Major with over six months combat service (Korea). As a Sgt/SFC (Adm NCO) he was assigned to position(s) of Sergeant Major or Acting 1st Sgt from 1953 thru 1957 (HQs US Army Europe Avn Comd Depot; HQs USAREUR PMD (GS) Training, Organization & Plans; HQs DA (GS), Army Avn,(MDW) ordered to active duty AUS (USAR) and assigned Ft. Sill, OK to attend BOC, due to math deficiency, with strong "leadership recommendations", and recommended further schooling, with understanding awarded constructive credit for BOC; relieved from School and assigned to Staff and Faculty for purpose of organizing a MP Security Detachment, with branch transfer to original branch of commissioning MPC, as exception to "DA-CMD policy" (APX P-225)[3] upon organization of MP Detachment became the first Commander (replaced by LTC, MPC) in support of the Army Artillery & Guided Missile Center, security of TOP

[3] Tab "V" returned by Cl. Ct.

SECRET equipment/classes; selected by PMG for classified assignment JTF 7.2 (Due overseas assignment). Assigned 720 MP Bn, Ft Hood duty with 1st Prov MP Company--being organized for movement to Marshal Island via Sandia Base for security, screening, and classified indoctrination--TDY from 720th MP Bn, Ft Hood. Prior to this assignment he was extremely active, apparent from the record, in local and National Reserve Officer Association "political" activities, elected National Jr Vice President--served on various national committee(s) to include a Panel (APX P-228) on the "Number One problem of the Army today", a responsible challenging problem which he took seriously, apparently too much so. Upon arrival at Ft Hood, it immediately became a conflict of issue and the record speaks...there after, personality clash with Commander, etc..he withdrew from ROA on receipt of letter of Counsel from Provost Marshal General, MG Hayden L.

Boatner (APX P-229)[4] further details are in Defendant's Administrative Appendix "201-Huntzinger".

Served as Military Aide to Governmor of New Mexico Jun 1962-Jan 1965. Appointed Colonel, ADC 10 Apr 1964.

September 8, 1968 ordered to Active Duty (AD) - position "LTC" Sr Advisor, Logistical Support Group Commander (Col). AUS, victim "Hong Kong Flu" -- PEB "Recommended continued AD" disapproved DESPER-DA, retired disability October 1, 1970.

II

--The Case-Facts--

The United States Court of Appeals for the Federal Circuit upheld a United States Claims Court decision which held that "Appellant failed to show deception or fraudulent concealment of the true facts that included his justifiable

[4] Tab "B-G" returned by Cl. Ct.

reliance and delay in bringing the action." Based on BCMR decision.

The Appeals Court opinion, DECIDED: October 20, 1986. "Appellant Huntzinger appeals the "summary judgement" of the United States Claims Court dismissing his complaint. Huntzinger v. United States, 9 Cl Ct 90 (1985). Appellant's complaint FILED MAY 28, 1985, challenged his removal from active service in the US Army in 1960 and sought reinstatement along with back pay and other benefits. The Claims Court held that Appellant's claims were barred by the statute of limitations. Finding no error in that decision, "we affirm on the basis of the Claims Court's opinion." Without ruling merits vs statute limitation.

Appellant filed "MOTION LEAVE OF THE COURT TO FILE REHEARING IN BANC (Rule 26 & 27), "FILED BY LEAVE OF THE COURT DEC 2, 1986." Decided by ORDER: A suggestion for rehearing in banc having been filed in this case, UPON CONSIDERATION THEREOF,

it is ORDERED that the suggestion for rehearing in banc is declined," dated Jan 1, 1987.

Appellant filed "Notice of Appeal, in the UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, WITH CERTIFICATE OF SERVICE.

III

The United States Court of Appeals for the Federal Circuit upheld a Claims Court Decision which held that "Mr Huntzinger failed to show deception or fraudulent concealment of the true facts that induced his justifiable reliance and delay in bring(ing) the action." In short, the Claims Court held and affirmed in the proposition that once Huntzinger knew that he was relieved/ separated from active duty in 1960, even though it appeared to him to be a factually-valid-discretionary separation. But in fact was based upon a hidden and false initiative to remove him for political reasons which was frauduently concealed from him until

1979, the statute of limitations was to run at that time regardless of whether he had any known legal basis for bringing suit. This proposition is contrary to the law of various other courts, conflicts with other decisions of this circuit, and the policy now supporting RULE 11, F.R.C.P., and similar Rules which require there to be a known reasonable basis upon which to bring suit.

IV

The entire thrust of Petitioner's case and brief is that Huntzinger was the target of a hidden, fraudulent, and deception initiative to remove him from the Army on a "for cause" basis, i.e., for making a false complaint, but under the guise and appearance of an annual screening. In other words, Huntzinger's removal was intentionally designed to look to Huntzinger and on the face of his personnel records "201" like an annual screening release

from active duty, when it was in fact a calculated and contrived scheme to eliminate him for his IG complaint, and to avoid a "for-cause" board action which might have been used by LTC Canon in his defense, and/or other senior officer(s) relieved under the described, existing chaos, fiasco, and conspiracies among the Military Police Officers. (See APP 122) This simultaneously "cover up", the true nature of the personnel action against Huntzinger, especially because documents relating to an IG recommendation based upon alleged false complaint were kept in a separate classified "sequestered IG" file, and thereby deprived him of substantial regulatory and Constitutional rights. On the facts which petitioner knew or could have known in 1960 there was no legal basis upon which he could have brought suit. How could the statute of limitations then have begun to run at that time? The Court must accept as true Huntzinger's allegations that many facts

were withheld, as reflected in the IG record/memorandums, because the Claims Court ruled on the basis of a summary judgement.

Petitioner endeavored to review his 201 file at the time of his release and on several occasions thereafter. However, all of those documents which disclosed consideration of the "for cause" aspects of his removal--the third and hidden IG initiative demonstrating his commander's (Ft Hood) conclusion that he had filed a false and malicious IG complaint--were SEQUESTERED apart from his official 201 file. Further, under Army Regulations (AR) he had no right to see them, no matter how diligently he may have endeavored.

(For the record, the Commander, Ft.Hood directing the investigation was relieved prior to completion of investigation. New commander approved curtailed investigation--contained to privy of his Command

& Staff.

Requested witnesses by Petitioner were declared not conveniently available, including former Commander, Deputy & disinterested officers/NCOs).

Under the preceding prescribed circumstances, letter by Huntzinger's Counsel of 26 Jan 1960, with his letter of Jan 24, 1960 to the Commander "confirm" the project "COVERED-UP, CONCEALED, HIDDEN, and SEQUESTERED IG recommendation" which Huntzinger was advised of by interrogatories of 11 Sep 1959 responded to 4 Nov 1959--by silence, and based on the review of his personnel record, made reasonable assumption that his response/appeal reviewed by HQs DA completely EXHONORATED him of the Fort Hood Allegations. No flagging action had been initiated, AR 600-31, or "show cause board" AR 15-6, and/or adverse action AR 640-98 and subsequent Command indorsement recommending Retention on Active Duty

coupled with the Post (Ft Dix & Ft Drum) Provost Marshal(s) and chain of command strong indorsement's including the Chief of Staff, Infantry Training Center, Ft Dix; subsequently, conditions Ft Hood "chaos, fiasco, and conspiracies" were confirmed by MG Haydon L. Boatner, the former Provost Marshal General, (App 122) acknowledged by Executive Secretary, BCMR "extremely important & new evidence" disregarded upon STAFF DESPER recommendation "time may have dulled the memory of Gen Boatner." BCMR had obligation make independent verification by IG taking testimony. (App 120). IG records were kept in a separate file in classified fashion under the designation "FOR OFFICIAL USE ONLY" (FOUO) (App 214). We submit that this was the intentional culmination of the course of fraud and deception; the very concealment of the weapon used to extinguish Huntzinger's career, the essence of fraudulent concealment. How better to <u>conceal</u> the true cause of Huntzinger's release and

the true nature of the proceeding against him than to remove all records relating to it from Official Files after the mischievous end had been achieved? An actual intent to conceal may be inferred from the disparity between the use and nature of the IG allegations before the annual screening board and the Department of Army's ultimate conclusion on the "cover sheet" to the IG file that it contained "NO PREJUDICIAL INFORMATION" (APP 212). Thus, when Huntzinger came to review his 201 file, the documents concluding that he had made a false complaint and his moral disqualification were not there and he had no reason to know and could not discern that these were the true reasons for his removal. In the absence of such information, the statute of limitations cannot begin to run until discovery, June 1979.

Even applying the Government's own standard, we should prevail. The Government notes that a cause of action

accrues "not later than the date of an alleged illegal separation." (Appellee's Br at 7). However it concedes "a limited excep-tion...if the plaintiff establishes either that the government concealed facts or that the nature of the injury was inherently unknowable at the time the cause of action accrued," citing Costal Petroleum Co. v. US, 228 Cl Ct 864, 866 (1981) cert. denied 456 US 915 (1982). The first prong of this test - concealment - is satisfied by the personnel which were intended to and which operated to hide the truth from Huntzinger neither the second prong - the inherent unknowability - is satisfied by comparing the documents in Huntzinger's 201 file prior to 1979 to those in the sequestered IG file, together with apparent procedural regularity on the face of Huntzinger's annual screening removal in 1960, and Huntzinger's absence of knowledge of and access to the "SEQUESTERED IG RECORDS."

At oral argument, the view was

stated that the purpose of the statute of limitations is to "save the taxpayer's money." That is simply an incorrect view of the policy behind the statute. "Saving money" is never a justification for denial of an opportunity to bring one's cause of action which passes due process muster. Another view was that upon separation Huntzinger should have filed suit, presumably without basis, in order to get discovery, and through that the fraudulently facts would have been found. That position flies in the face of Rule 11 and its basis, and would as a matter of policy cause unfounded suits to be brought to the Claims Court simply, speculation, to enable discovery of any unknown initiative or fraudulent concealment policy a prophylatic matter.

Further, one need only review the attached law review article attached verbatim, to understand that the law has and should disavow the untendable position which unnecessarily underlies the panel's decision. Mr. Saul B. Shapiro

clearly demonstrates the legal weakness, and varying court opinions, decision.

The Government seems willing to concede that Huntzinger did not know of the "secret initiative" against him. Then, the critical question is whether, given the record here, Huntzinger should have known... Put slightly differently, does the record establish that information needed by Huntzinger to understand the true nature of his removal in 1960, as distinguished from an annual screening solely on the basis of efficiency reports, was concealed from him by acts of fraud and deception or was otherwise unknowable? The answer is a resounding "yes." Conversely, were the discretionary separation and his reclama concerning efficiency report enough, without more, to justify a suit by Huntzinger? Two ERs one unit? The answer is an equally unequivocal resounding "NO!" Major General Biddle directed the Fort Hood Inspector General to conduct an investigation. It was not referred to a

higher echlone at this point, despite AR 20-1 (App 145), and was therefore subject to command influence, as projected in sworn testimony by Huntzinger's appeal direct to HQ DA TIG 30 Jan and 7 Feb 1959 concerning the LTC Canon DA-IG investigation & MP activity-Provost Marshal Staff-Command relationships. At that point Huntzinger requested that any "investigation concerning himself be conducted by DA on the basis of his letter of 24 January 1959 in conjunction with his reclama to ERs received during a 9 month rating period assigned 720 MP Bn, Ft Hood, reiterated in his sworn testimony in response to interrogatories forwarded to IG Ft Dix (App 65), dated 4 Nov 59 (App 75), appeal accepted under advisement by DA TIG. No further action, reasonable assumption response satisfied DA, Huntzinger was <u>completely</u> EXHONORATED, Ft Hood IG allegations, unfounded, as <u>final</u> review by DA-TIG is recorded (App 212) 3 Aug 1960.

LTC M.I. Freeman, the IG Action Officer, in connection with the Huntzinger complaint (App 159), regarded Huntzinger as the target, rather than the victim in the investigation. The objective of the IG process became the elimination of Huntzinger, without reference to a "board" of officers, not mere exploration of Huntzinger's follow-up letter to reclama of ERs, as requested by his Sr. Commander, (unknown to Huntzinger also under investigation Classified "Secret" IG record - GSA Archives "MP Activity Ft Hood", access denied] re: LTC Canon) proper IG recommendation/findings, without notification to Huntzinger as required by AR 20-1, resulted in submission to DA ADB for removal under annual screening criteria, with adverse-prejudicial matter considered in violation of Secretary Army Instruction on guidance to the President, DA ADB governing qualification of adverse matter to be considered (Biddle v. US, App 28)(conf C4 AR 135-173), and charged

the board with responsibilitiy verification of information considered pursuant action under AR 135-173 (App 4) and 135-215 (App 12); which was employed as a "SHAM" to cause his removal without "board" action governing "show for cause" (requested ltr 19 Mar 60 denied)--was not known--, indeed was suppressed from him. Fraudulent recommendation was not verified (App Appellee 200) by OPMG record.

Further submit that the true nature of Huntzinger's removal from active duty was "inherently unknowable" since the myriad breaches of regulation(s) could not have been known/ascertained without knowledge of or reference to the sequestered material that was withheld until 1979. Huntzinger sought and reviewed all material related to his release both then and later. On the face of Huntzinger's Official 201 file, his 1960 release from active duty appeared to be regular and based entirely upon the efficiency reports. There was no

reference to the FOUO file, and without knowing of its existence, its contents are "inherently unknowable the negligent conduct." The duty to inquire is triggered by the knowledge of the injury. Here Huntzinger knew of his release, did inquire further, but believed only that he was being removed from active duty for challenged OERs-ROA "Dual Loyalties."(APX P-229) But, contrary to the Government's assertion, Huntzinger was not "armed with facts about" his true injury--his Commander's (former) "secret" conclusion on basis of a secret IG report that Huntzinger had made a false and malicious complaint to the IG, the improper and surreptitious publications of that conclusion to an elimination board, and the ultimate cover-up of the entire course of events through the use of the separate "classified - SEQUESTERED FOUO FILE" by TIG to include ADB action documents.

To accept the Court's proposition, Huntzinger should have sued without basis

prior to June 24, 1966, and had he done so he might have discovered the true basis for his release--and a basis for his suit. In light of the recent policy underpinings of changes to Rule 11, Fed. R. Cir. P., such a position yields a highly dangerous policy, and destroys the due process rights of appellant by denying him a meaningful opportunity to bring suit, ie., ONLY after a reasonable known basis exists.

The US Army in their update of AR 20-1 para 1-30 recognize, need clairfy, use of and entitlement "due process" when employed in personnel action. (See APX P-232). The service member is caught between the "Rock & Hardstone" without entitlement "due process" afforded by government regulation in violation of his guaranteed rights pursuant UCMJ and Constitutional Amendments which he must defend. Hence, victim of those rights, by illegal, wrongful, violations by misuse of boards, concealed illegally, and "hoodwinking." But, the soldier must

comply with orders, such as Huntzinger did, rely upon the system, i.e., IG for a fair and impartial investigation. This we submit is in err, by acceptance at face value without verification or investigation.

The Yale Law Journal

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Citizen Trust and Government Cover-up: Refining the Doctrine of Fraudulent Concealment

Saul B. Shapiro

More than a decade after Watergate, neither Congress nor the federal courts have developed law that adequately guards against the government's ability to cover up its wrongdoing and later escape liability by pleading the statute of limitations. To determine when the limitations period begins to run on claims concealed by the government, federal courts employ the tolling standard designed to address relations between parties at arm's length. The government-citizen relationship, however, includes an element of trust and an imbalance of power and access to information that are not present in arm's length dealings. Federal tolling doctrine should be refashioned to reflect that relationship. This Note argues that courts can do this by analyzing cases alleging government cover-up under the tolling standard applied to parties between whom there is a special relationship of trust or confidence.

I. Fraudulent Concealment and the Government

A. *The Doctrine*

Whenever a party knowingly commits a tort that is self-concealing, or commits a tort and then covers it up, the party is guilty of fraudulent concealment.[1] A self-concealing tort is one which is inherently unknowable, or which is part of a larger scheme that includes acts designed to

1. Modern fraudulent concealment doctrine is usually traced back to Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875), and Wood v. Carpenter, 101 U.S. 135 (1879), in which the Supreme Court adopted the doctrine as a matter of federal common law. For a history of how the doctrine has evolved from the common law, see Dawson, *Undiscovered Fraud and Statutes of Limitation*, 31 Mich. L. Rev. 591 (1933) [hereinafter cited as Dawson, *Undiscovered Fraud*], and Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875 (1933) [hereinafter cited as Dawson, *Fraudulent Concealment*]. A more recent treatment is available in Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 Geo. L.J. 829 (1983).

At one time the two types of fraudulent concealment were thought of as separate doctrines. Although some courts still make a distinction between self-concealing torts and those that are subsequently concealed, *see infra* note 39, courts and commentators tend to see both types as comprising the single doctrine of "fraudulent concealment," *see, e.g.*, Hobson v. Wilson, 737 F.2d 1, 33 n.102 (D.C. Cir. 1984), *cert. denied sub nom.* Brennan v. Hobson, 105 S. Ct. 1843 (1985); Marcus, *supra*, at 870.

prevent the victim from discovering his cause of action.[2] In such cases, the injury or its cause frequently is not apparent to the victim until after the limitations period has run.[3] Fraud is the prototypical example,[4] but a slowly germinating toxic tort[5] or even a clandestine effort by law enforcement agencies to discredit anti-war activists would also fit into this category.[6] The second type of concealment occurs when a tort is followed by acts or statements intended to cover up the initial wrongdoing.[7] In these cases, the injury may be apparent, but the cause of action is concealed. The Army's attempt to cover up the fact that it conducted fatal chemical warfare experimentation on an unwitting patient is an example of this type of concealment.[8]

In these circumstances, a court must decide whether to toll[9] the statute of limitations. As the Supreme Court explained over a century ago, statutes of limitation:

> were enacted to prevent frauds . . . . To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.[10]

---

2. *See Hobson*, 737 F.2d at 33–34. In the case of the inherently unknowable tort, some courts hold that the defendant must demonstrate a "minimum of culpability" by, at the least, "construct[ing] a scheme which is by its nature unknowable." Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 118 n.7 (D. Conn. 1978). *See generally* Marcus, *supra* note 1, at 865–70 (discussing self-concealing torts); Dawson, *Undiscovered Fraud*, *supra* note 1 (same).

3. *See, e.g.*, Nitol v. United States, 7 Cl. Ct. 405, 414 (1985) (injuries from government atomic testing in Marshall Islands became apparent only after limitations had run); Allen v. United States, 588 F. Supp. 247, 341 (D. Utah 1984) (injuries from government atomic testing in Nevada became apparent only after limitations period had run).

4. Indeed, at one time the commission of a self-concealing tort was classified as fraudulent concealment only if the concealed cause of action itself was premised on fraud. This approach has been abandoned. *See* Marcus, *supra* note 1, at 867–69.

5. *See, e.g.*, cases cited *supra* note 3.

6. Hobson v. Wilson, 737 F.2d 1, 36–37 (D.C. Cir. 1984) (federal and local law enforcement agencies engaged in campaign of wiretapping and disinformation to undermine civil rights and anti-war groups), *cert. denied sub nom.* Brennan v. Hobson, 105 S. Ct. 1843 (1985).

7. *See, e.g.*, Hohri v. United States, 782 F.2d 227, 248 (D.C. Cir. 1986) (government covered up knowledge that there was no military necessity for West Coast concentration camps during World War II). *See generally Hobson*, 737 F.2d at 33–34 (discussing affirmative concealment); Dawson, *Fraudulent Concealment*, *supra* note 1, at 877–82 (same).

8. *See* Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), *cert. denied sub nom.* Cattell v. Barrett, 462 U.S. 1131 (1983).

9. "To suspend or stop temporarily." BLACK'S LAW DICTIONARY 1334 (5th ed. 1979).

10. Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1875). As a more recent court explained fraudulent concealment:

> In such cases, the underlying policy of the statute of limitations, discouraging litigation of "stale" claims, does not arise. The claim is not stale. It merely took time to accrue. Genuine concern about lost evidence, fading memories and the passage of time are subordinated to a greater concern that legal wrongs be remedied at the first practical opportunity.

Allen v. United States, 588 F. Supp. 247, 341 (D. Utah 1984).

The common law developed two standards for tolling the statute of limitations in cases of fraudulent concealment.[11] One standard is applied to parties at arm's length,[12] the other to parties between whom there is a relationship of trust or confidence.[13] Under both standards the defendant's concealment of material information surrounding his wrongdoing tolls the limitations period until plaintiff discovers, or in the exercise of due diligence should have discovered, the concealed cause of action.[14] Within that common framework, however, the two standards are very different. The arm's length standard takes a much more expansive view of what should place a plaintiff on notice of his claim, and a much narrower view of what constitutes concealment. For the plaintiff seeking to toll the limitations period, the decision of which standard is applied can determine whether or not he is able to bring his substantive claim in court.

Under the arm's length standard, the diligence of the plaintiff's inquiry into the existence of a claim is judged according to an objective reasonable person standard. No allowance is made for any trust plaintiff may have had in the honesty of defendant's behavior or representations.[15] More important, the arm's length rules define concealment very narrowly: The defendant is under no duty to disclose her wrongdoing. Her silence will not stop the clock from running on an injured plaintiff's cause of action.[16] Indeed, the defendant's *denial* of wrongdoing does not constitute fraudulent concealment, and will not serve to toll the statute of limitations.[17]

Courts find the arm's length standard too harsh to apply to certain relationships. In relationships where the concealing party's honesty or forthrightness is expected or should be encouraged, courts apply a different standard.[18] Under this "trusted defendant" stan-

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11. The Seventh and Second Circuits apply a slight modification of these standards. *See infra* note 39.

12. *See infra* notes 15–16 and accompanying text.

13. *See infra* notes 18–22 and accompanying text.

14. *See, e.g.*, Ramsey v. Culpepper, 738 F.2d 1092, 1098 & n.2 (10th Cir. 1984) (applying trusted defendant standard); Fitzgerald v. Seamans, 553 F.2d 220, 228 (D.C. Cir. 1977) (applying arm's length standard).

15. *See, e.g.*, Campbell v. Upjohn Co., 498 F. Supp. 722, 727–28 (W.D. Mich. 1980), *aff'd*, 676 F.2d 1122 (6th Cir. 1982); Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 117 n.5 (D. Conn. 1978). *See generally* Marcus, *supra* note 1, at 878–82 (discussing objective standard).

16. *See* Wood v. Carpenter, 101 U.S. 135, 143 (1879); Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978); Dayco Corp. v. Firestone Tire & Rubber Co., 386 F. Supp. 546, 549 (N.D. Ohio 1974), *aff'd*, 523 F.2d 389 (6th Cir. 1975). *See generally* Marcus, *supra* note 1, at 864–65 (discussing rules governing concealment).

17. *See, e.g.*, Davis v. United States, 642 F.2d 328, 332 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982); Peck v. United States, 470 F. Supp. 1003, 1019 (S.D.N.Y. 1979); *Dayco*, 386 F. Supp. at 549. *But see Rutledge*, 576 F. Supp. at 250 (stating in dictum that denial "may" in certain circumstances constitute concealment). *See generally* Marcus, *supra* note 1, at 861–64 (discussing denial).

18. *See* Dawson, *Fraudulent Concealment*, *supra* note 1, at 879 & n.11 (citing cases); Dawson, *Undiscovered Fraud*, *supra* note 1, at 610–14. For a more elaborate discussion of the relationships which have warranted the different standard, see *infra* note 22.

dard,[19] the concealing party is under a duty to disclose his wrongdoing to the plaintiff. His failure to disclose, or his denial of wrongdoing, constitutes fraudulent concealment, tolling the statute of limitations.[20] As under the arm's length standard, the limitations period remains tolled until the injured party discovers, or in the court's judgment should have discovered, the concealed cause of action. But in determining when the plaintiff should have discovered the concealed cause of action, the existence of the relationship of trust reduces the degree of diligence required of the plaintiff. The plaintiff has no duty to mistrust the statements of the trusted defendant, and may rely on him to disclose all facts material to any wrongdoing. Thus, the plaintiff is excused from investigating facts that, in an arm's length relationship, would put him on notice of possible wrongdoing.[21]

The relationships that have been found to warrant the trusted defendant standard cannot easily be categorized. While the standard applies to fiduciary relationships, it also applies to a wide range of relationships that do not meet that strict legal standard.[22] Because the labels courts have

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19. There is no formal term for this standard. The relationships that give rise to the standard have been given many labels. *See infra* note 22. The term "trusted defendant" seems most descriptive of the full panoply of relationships to which the standard has been applied.

20. *See, e.g.*, Ramsey v. Culpepper, 738 F.2d 1092, 1098 n.2 (10th Cir. 1984); Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck, 507 F. Supp. 873, 878 (D.S.D. 1981); *see also Rutledge*, 576 F.2d at 250 (discussing trusted defendant standard). *See generally Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1221 (1950) [hereinafter cited as *Developments*] (same).

21. *See, e.g.*, *Ramsey*, 738 F.2d at 1098 n.2; Bennett v. Hibernia Bank, 47 Cal. 2d 540, 550, 305 P.2d 20, 33 (1957).

Application of the trusted defendant standard does not, however, relieve plaintiff of his duty to make a reasonable investigation; it only affects what the court considers reasonable. *See, e.g.*, Hupp v. Gray, 500 F.2d 993, 997 (7th Cir. 1974) (limitations period had run on plaintiff's claim despite "fiduciary relationship"); *see also* Gee v. CBS, Inc., 471 F. Supp. 600, 630 (E.D. Pa.) ("the phrase 'breach of fiduciary duty' is not talismanic, in the presence of which the statute of limitations withers away"), *aff'd*, 612 F.2d 572 (3d Cir. 1979).

22. *See* Dawson, *Fraudulent Concealment*, *supra* note 1, at 879 n.11 (citing cases "where the plaintiff's reliance was justified, not by the 'fiduciary' character of the defendant's obligation inferred as a matter of law, but by an expectation of good faith known to the other party and abused"); *Ramsey*, 738 F.2d at 1096 (tolling limitations period in light of "confidential" relationship between elderly absentee landlord and local real estate broker); Spinelli, Kehiayan-Berkman, S.A. v. Imas Gruner, A.I.A. & Assoc., 602 F. Supp. 372, 375 (D. Md. 1985) (tolling limitations period in light of "fiduciary" relationship between managing partners and limited partners); Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck, 507 F. Supp. 873, 878 (D.S.D. 1981) (tolling limitations period in light of relationship of "trust and confidence" between architect and client); *Developments*, *supra* note 20, at 1221 (relationships "of a fiduciary nature" warrant trusted defendant standard).

Perhaps the best exegesis of the relationships to which the trusted defendant standard has been applied is contained in the Restatement's definition of confidential relations:

> A confidential relation exists between two persons when one has gained the confidence of the other and purports to act with the other's interest in mind. A confidential relation may exist although there is no fiduciary relation; it is particularly likely to exist where there is a family relationship or one of friendship . . . .

1 RESTATEMENT (SECOND) OF TRUSTS § 2(b) (1959).

used to describe relationships warranting the standard are not exact[23] and often appear to be attached without sufficient care,[24] an understanding of which relationships warrant the trusted defendant standard is better gleaned from an analysis of the factors courts have considered relevant than from the labels they have attached. In general, courts apply the standard to relationships in which there is trust or confidence between the parties,[25] where there is an inequality of power between the parties,[26] or where the concealing party has vastly superior access to information concerning the concealed cause of action.[27] Courts have taken note of particular categories of relationships that are expected to give rise to a duty of honesty and forthrightness.[28] Those categories, however, while extremely relevant to the courts' decisions, have not been dispositive. Instead, courts usually decide which tolling standard to apply on the basis of the sum of relations between the parties.[29]

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23. *See* 15A C.J.S. *Confidential* (1955) 355 (confidential relationships "impossible of exact or precise definition"); Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 154–56 (1981) (definition of fiduciary duty varies from state to state).

24. *See* 1 RESTATEMENT (SECOND) OF TRUSTS § 4 (1959) ("the term 'trust' is sometimes used loosely" giving rise to unjustified range of duties); Coffee, *supra* note 23, at 141 ("the term 'fiduciary' can become a substitute for close analysis, a rhetorical flourish to be used in place of a logical distinction"); *see also* United States v. Margiotta, 688 F.2d 108, 142 (2d Cir. 1982) (Winter, J., dissenting) ("[t]he words fiduciary duty are no more than a legal conclusion and the legal obligations actually imposed under that label vary greatly from relationship to relationship"), *cert. denied*, 461 U.S. 913 (1983).

25. *See, e.g.*, *Ramsey*, 738 F.2d at 1097 (tolling statute of limitations in light of elderly absentee landlord's trust in local real estate broker); State Farm Mut. Auto. Ins. Co. v. Ling, 348 So. 2d 472, 475 (Ala. 1977) (because adversary insurance company had gained plaintiff's confidence, its failure to tell him that limitations might run on his claim tolled the limitations period). *See generally* Dawson, *Fraudulent Concealment*, *supra* note 1, at 879 n.11 (citing cases).

26. *See, e.g.*, *Ramsey*, 738 F.2d at 1096 (plaintiff's dependence on defendant is factor in tolling standard); Baselski v. Paine, Webber, Jackson & Curtis, Inc., 514 F. Supp. 535, 540 (N.D. Ill. 1981) (tolling limitations based on plaintiff's relative "unsophistication"). *See generally* Dawson, *Fraudulent Concealment*, *supra* note 1, at 879 ("personal inequality" is factor warranting change in tolling standard).

27. *See, e.g.*, *Ramsey*, 738 F.2d at 1097 (tolling limitations in part because defendant was plaintiff's only source of information about events surrounding wrongdoing); State Farm Mut. Auto. Ins. Co. v. Ling, 348 So. 2d 472, 475 (Ala. 1977) (limitations tolled in part because of defendant's "special and superior knowledge").

28. *See, e.g.*, Spinelli, Kehiayan-Berkman, S.A. v. Imas Gruner, A.I.A. & Assoc., 602 F. Supp. 372, 375 (D. Md. 1985) (managing partners and general partners); *Bazelski*, 514 F. Supp. at 540 (investor and securities firm).

29. When the formal relationship between the parties suggests that the trusted defendant standard is applicable, but the facts indicate otherwise, the court will apply the arm's length standard. *See, e.g.*, Tonsmeire v. Tonsmeire, 285 Ala. 454, 456, 233 So. 2d 465, 467 (Ala. 1970) (arm's length standard applied in libel suit brought by wife against husband where "trust and affection has vanished from their relationship").

B. *Government Concealment Under the Arm's Length Standard*

Federal courts[30] analyze government[31] cover-up under the arm's length standard.[32] The arm's length standard's limitations on what constitutes concealment does not account for any faith the plaintiff may place in the honesty of government statements or conduct. Under the arm's length standard, the government has no duty to inform citizens of the injuries it

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30. This discussion will focus on federal fraudulent concealment doctrine. Since the Supreme Court's 1946 holding that federal fraudulent concealment doctrine is read into "every" federal cause of action, Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946), federal courts have applied federal fraudulent concealment doctrine to adopted state statutes of limitation as well as to federal statutes of limitation. *See generally* Marcus, *supra* note 1, at 831–33, 839–41 (discussing emergence and extent of federal fraudulent concealment doctrine). Federal fraudulent concealment doctrine thus applies to tort suits based on federal causes of action against federal, state and local government and government officials. This includes suits where a federal limitations period is prescribed in the statute, for example, under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 2671–80 (1982) (which contains a limitations period at 28 U.S.C. § 2401(b) (1982)), *e.g.*, Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982), *cert. denied sub nom.* Cattell v. Barrett, 462 U.S. 1131 (1983), and under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1982) (which includes a limitations period at 28 U.S.C. 2401(a) (1982)), *e.g.*, Hohri v. United States, 782 F.2d 227, 246 (D.C. Cir. 1986). In addition, this discussion will assume that federal courts will continue to apply federal fraudulent concealment doctrine to adopted state statutes of limitation. Some uncertainty concerning the source of tolling doctrine was created by Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), and Board of Regents v. Tomanio, 446 U.S. 478 (1980), which together can be read broadly to require federal courts to apply state tolling doctrine when adopting state statutes of limitation. Nevertheless, federal courts continue to apply federal fraudulent concealment doctrine to adopted state statutes of limitation. *See, e.g.*, Sevier v. Turner, 742 F.2d 262, 272 (6th Cir. 1984) (applying federal doctrine to adopted state statute of limitations in suit under 42 U.S.C. § 1983 (1982)); Richards v. Mileski, 662 F.2d 65, 68 (D.C. Cir. 1981) (applying federal doctrine to suit directly under the Constitution); *see also* Marcus, *supra* note 1, at 845–55 (federal courts should continue to apply federal doctrine). *But see* Vest v. Bossard, 700 F.2d 600, 602–04 (10th Cir. 1983) (applying state law to suit under § 1983).

With respect to any uncertainty over the source of tolling doctrine, it should be noted that the argument presented here is as applicable to state tolling doctrine as to federal law. Indeed, because federal doctrine is generally more liberal than state doctrine, *see* Marcus, *supra* note 1, at 834–35 n.41, if federal courts began to apply state law to adopted state statutes of limitation there would be an even more compelling need for the application of the trusted defendant standard to government concealment.

31. "Government" will refer to federal, state and local governments and government officials. Fraudulently concealed federal actions against these parties may be tolled according to traditional tolling principles under the Supreme Court's holding in *Holmberg*, 327 U.S. at 397, that federal fraudulent concealment tolling doctrine is read into "every" federal cause of action (without regard to the identity of the parties). *See* Hohri v. United States, 782 F.2d 227, 247 (D.C. Cir. 1986) (discussing *Holmberg*); *see also supra* note 30 (citing cases tolling actions against government).

On two occasions, courts have held that because statutes of limitations governing suits against the United States are limited waivers of the government's sovereign immunity to which exceptions are to be strictly construed, fraudulent concealment does not apply. *See* Hammond v. United States, 388 F. Supp. 928, 934 (E.D.N.Y. 1975); Richter v. United States, 551 F.2d 1177, 1177 (9th Cir. 1977) (following *Hammond* without explanation). Both decisions have been superceded. *See* Gibson v. United States, 781 F.2d 1334, 1344–45 (9th Cir. 1986) (superceding *Richter*); *Barrett*, 689 F.2d at 330 (superceding *Hammond*). As *Hohri* pointed out, courts adopted the doctrine of fraudulent concealment long before the middle of the nineteenth century. To hold that the doctrine was not incorporated into any subsequently enacted federal statute of limitations would do violence to congressional intent. *Hohri*, 782 F.2d at 247–48.

32. *See, e.g.*, Hobson v. Wilson, 737 F.2d 1, 33–36 (D.C. Cir. 1984), *cert. denied sub nom.* Brennan v. Hobson, 105 S. Ct. 1843 (1985); Davis v. United States, 642 F.2d 328, 332 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982); Peck v. United States, 470 F. Supp. 1003, 1019 (S.D.N.Y. 1979).

has caused them.[33] It may remain silent while the limitations period runs on their claims.[34] The limitations period will not be tolled if the government denies responsibility—even if it knowingly lies—in response to a citizen's request for information about his injury.[35] Indeed, one court held that the government's denial of wrongdoing should have aroused plaintiff's suspicion and put him on notice of his claim.[36]

Similarly, the arm's length standard's objective due diligence test does not make allowances for a citizen's trust in government.[37] Without regard to whether government concealment might have posed a special bar to particular plaintiffs, courts have held that plaintiffs failed to exercise sufficient diligence in pursuit of their claims.[38] Despite the fact that many of these decisions are often based on no more than speculation about what should have put a plaintiff on notice of her claim,[39] some plaintiffs have

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33. *See* Davis v. United States, 642 F.2d 328, 332 (9th Cir. 1981) ("It may well be that the government was negligent in maintaining and publishing records. However, failure of the government to ascertain and publish the fact of its negligence is hardly sufficient to constitute fraudulent concealment."), *cert. denied*, 455 U.S. 919 (1982); Hauptmann v. Wilentz, 570 F. Supp. 351, 399 (D.N.J. 1983), *aff'd*, 770 F.2d 1070 (3d Cir. 1985); Peck v. United States, 470 F. Supp. 1003, 1019 (S.D.N.Y. 1979) ("As to the failure to disclose the government's role in the Freedom Ride in the 1961 action, the law is clear that, in the absence of a fiduciary duty between the parties, mere failure to disclose the existence of a cause of action does not constitute concealment.").

34. *See* Hernandez Jimenez v. Colero Toledo, 604 F.2d 99, 101–02 (1st Cir. 1979); *Hauptmann*, 570 F. Supp. at 399; *Peck*, 470 F. Supp. at 1019.

35. *See Davis*, 642 F.2d at 332; *Hauptmann*, 570 F. Supp. at 399; *Peck*, 470 F. Supp. at 1019; *see also* Welcker v. United States, 752 F.2d 1577, 1583 (Fed. Cir.) (rejecting argument that government employee's suit to recover for wrongful dismissal in 1950's loyalty security proceeding was tolled by belief that judicial protest would have been futile in the face of government denial and "the tenor of the times"), *cert. denied*, 106 S. Ct. 83 (1985).

36. *Davis*, 642 F.2d at 332 n.10 (government press release and reports denying connection between government polio vaccine and contraction of polio should have helped to put polio victim on notice of his claim).

37. *See* Richards v. Mileski, 662 F.2d 65, 71 (D.C. Cir. 1981) (applying reasonable person standard in suit alleging government concealment).

38. For example, in Hernandez Jimenez v. Colero Toledo, 604 F.2d 99 (1st Cir. 1979), the court held that plaintiff, a government official fired for political reasons, did not make a diligent search into the circumstances surrounding his dismissal. The court did not consider that evidence of the political conspiracy might have been difficult to uncover. The court even went so far as to suggest that the fact that plaintiff's friend eventually learned of the conspiracy by overhearing a discussion at a celebration in a village square was evidence of how easily the information could have been obtained. *Id.* at 102. *See also* Sevier v. Turner, 742 F.2d 262, 273 (6th Cir. 1984) (limitations had run on civil rights action against law enforcement officers because plaintiff should have known his legal rights were being violated and that he had a right to counsel).

39. It is hard to summarize due diligence decisions. While plaintiffs have been held to have been put on notice of their claims by newspaper articles they did not necessarily read, *see* cases cited *infra* note 41, other courts have found that plaintiffs may not have been put on notice by massive and relatively undisguised torts. Pollard v. United States, 384 F. Supp 304, 307–08 (M.D. Ala. 1974) (rejecting government's motion for summary judgment in suit brought by plaintiff class of former participants in 1940's syphilis study). Circuit courts have simply disagreed with the court below over whether the concealed information was necessary to put the plaintiff on notice of his claim, *compare* Fitzgerald v. Seamans, 384 F. Supp. 688, 694 (D.D.C. 1974) *with Fitzgerald*, 553 F.2d 220, 229 (D.C. Cir. 1977); or whether the plaintiff should have been more diligent, *compare* Hohri *v.* United States, 586 F. Supp. 769, 791 (D.D.C. 1984) *with Hohri*, 782 F.2d 227, 251–55 (D.C. Cir. 1986).

The presence of the government as the defendant only exacerbates a general difficulty the courts

been barred on the basis of the limited facts available at the pleading stage.[40] One court dismissed a claim alleging constitutional injuries because of its belief that constructive notice was created by reporting in the "nation's leading newspapers."[41] Where courts have held that plaintiffs are put on notice of their claims by the mere awareness of their injury—rather than when they know of a particular cause of action against particular defendants[42]—the difficulties facing plaintiffs under the arm's length standard are exacerbated.[43]

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have experienced applying the objective due diligence test. *See generally* Marcus, *supra* note 1, at 899 (courts' "eclectic approach" has made it "impossible to reconcile all the cases"). As a result of this difficulty and to avoid allowing a defendant to escape solely as a result of the plaintiff's naivete or laxity, two circuits and one district court in another circuit toll the limitations until the plaintiff's actual discovery of the cause of action when torts have been affirmatively concealed. *See* Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975); Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979); McConnell v. Frank Howard Allen & Co., 574 F. Supp. 781, 788 (N.D. Cal. 1983). This change in the doctrine has not been followed widely. *See, e.g.*, Cambell v. Upjohn, 676 F.2d 1122, 1127 (6th Cir. 1982) (actual discovery standard "would have the statute tolled indefinitely, while evidence stales, memories fade and courts and adversaries wait, until the plaintiff at his leisure alleges actual discovery"); *see also Hohri*, 782 F.2d at 248 & n.54 (following *Campbell*, but noting that split may be "more apparent than real" because active concealment cases have involved such effective concealment that no plaintiff could be expected to uncover wrongdoing).

40. *See, e.g.*, Lee v. Kelley, No. 76-1185, slip op. (D.D.C. Jan. 31, 1977) (on motion to dismiss rejecting plaintiff's argument that government concealment tolled the limitations period); *see also* Richards v. Mileski, 662 F.2d 65, 73 (D.C. Cir. 1981) (reversing district court that granted government's motion to dismiss without even hearing oral argument on the issue of concealment); Smith v. Nixon, 606 F.2d 1183, 1186 (D.C. Cir. 1979) (reversing district court's dismissal of plaintiff's allegation of government concealment on motion to dismiss), *cert. denied*, 453 U.S. 912 (1981). As the *Richards* court noted:

> There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense.

662 F.2d at 73. *See generally* Marcus, *supra* note 1, at 904 (arguing that courts should cease practice of dismissing claims alleging fraudulent concealment on pleadings).

41. *Lee*, slip op. at 3 (civil rights action filed by former assistant to Dr. Martin Luther King accrued not when illegal wiretapping was revealed in 1975 Senate report but in 1960's when the "nation's leading newspapers were rife with accounts of buggings of Dr. King"); *see also* United Klans of America v. McGovern, 621 F.2d 152, 154 (5th Cir. 1980) (plaintiffs put on notice by press reporting). *But see* Hobson v. Wilson, 737 F.2d 1, 39 n.118 (D.C. Cir. 1984) (plaintiff's claim remains alive if he did not read newspaper article that would have put him on notice), *cert. denied sub nom.* Brennan v. Hobson, 105 S. Ct. 1843 (1985).

42. *See Hobson*, 737 F.2d at 35, 36 (discussing standard and citing cases).

43. For example, in Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986), the court barred a Federal Tort Claims Act claim alleging that, as part of an effort to hinder plaintiff's political activities, FBI agents directed an agent provocateur to steal documents from plaintiff's garage and set the garage on fire to cover his tracks. Plaintiff also alleged that the FBI further concealed its actions by filing a fictitious account of the incident with the local fire department, blaming the fire on a negligent marijuana-smoking teenager. *Id.* at 1343. The court rejected plaintiff's argument that the limitations period should have been tolled until she discovered the government's role in the wrongdoing. Rather than treating the entire scheme as a self-concealing tort, *see supra* text accompanying notes 2–6, or the fire and the phone call to the fire department as affirmative acts of concealment following the original tort, *see supra* text accompanying notes 7–8, and tolling the limitations period until plaintiff could bring a claim against particular defendants, the court treated the call as the only act of concealment. *Id.* at 1345. The court analyzed the fire under a medical malpractice accrual standard, holding that the limitations period began to run almost immediately after the blaze was discovered; i.e., at the point that plaintiff knew the fact of her injury (the lost garage) and its cause (the fire). *Id.* at 1344. In

Application of the arm's length standard to government-citizen relationships has been damaging as much for the confusion it has created as for the injustices it has wrought. Faced with egregious acts of government cover-up, federal courts, particularly at the circuit level, have found a variety of ways to keep suits alive. A few courts have gone outside the parameters of equitable tolling doctrine in attempts to take account of the government-citizen relationship.[44] More often, however, courts have applied aspects of the trusted defendant standard under the rubric of the arm's length doctrine. Thus, courts have reduced the diligence required of plaintiffs alleging government cover-up.[45] In addition, one court expanded its definition of concealment to include denial,[46] and at least two courts have come close to imposing on government a duty of disclosure.

In *Allen v. United States*,[47] a suit to recover damages for cancer and leukemia allegedly caused by atomic testing in Nevada, the court noted that the "clock of limitations could have started to run a long time ago had the [government] but started it by imparting to the population at risk that which it then knew or had reason—and real opportunity—to know and which the plaintiffs are just now finding out."[48] Similarly, in *Hohri v.*

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its fraudulent concealment analysis, the court held that the fictitious report the FBI filed with the fire department did not constitute concealment because evidence available immediately after the fire was discovered suggested arson. *Id.* at 1345. For a discussion distinguishing accrual under medical malpractice from tolling under fraudulent concealment, see Hohri v. United States, 782 F.2d 227, 249 n.56 (D.C. Cir. 1986).

44. *See* Bell v. Milwaukee, 746 F.2d 1205, 1229–31 (7th Cir. 1984) (employing Wisconsin equitable estoppel doctrine to ensure a remedy for plaintiffs seeking redress for gross civil rights violations by police officers); Saffron v. Wilson, 481 F. Supp. 228, 255 (D.D.C. 1979) (altering pleading and discovery requirements for plaintiff alleging fraudulent concealment by the Secret Service). For a discussion of why equitable estoppel is not an adequate substitute for the arm's length standard, see *infra* note 105 and accompanying text.

45. *See* Liuzzo v. United States, 485 F. Supp. 1274, 1284 (E.D. Mich. 1980) ("activity that tends to hide the participation of government related personnel in torts that occur in the course of their duties may provide a longer time to those injured to make claims than would be true if other methods were used").

46. *See* Smith v. Nixon, 606 F.2d 1183, 1191 n. 44 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981) (defendant government officials' incorrect denial of allegations of wrongdoing made in press and failure to inform Department of Justice of wiretap records that were relevant to related criminal prosecution constituted fraudulent concealment). The basis of the *Smith* holding is unclear. First, it is unclear whether the denial itself was sufficient to constitute concealment. Assuming that it was, the court's reasoning remains a mystery. The court specifically rejected the possibility that fiduciary relations existed between the parties, *id.* at 1190, yet purported to follow "traditional" tolling doctrine. *Id.* at 1191 n.44. The court's reasoning, however, is hardly traditional: The court drew an analogy between the government's conduct in the case before it, and the cloak of secrecy that surrounded the government's wrongdoing in Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977). In *Fitzgerald*, the court had held that the secretive nature of a tortious government investigation was an aggravating factor in the court's decision to apply fraudulent concealment doctrine. *Id.* at 228. The *Richards* court held that the government officials' acts in the case before it constituted the same type of "affirmative acts" as had been perpetrated in *Fitzgerald*. However, while the secret nature of the actions in *Fitzgerald* conforms to the traditional model of the self-concealing tort, *see supra* text accompanying notes 2–6, the denial does not, *see supra* text accompanying note 17.

47. 588 F. Supp. 247 (D. Utah 1984).

48. *Id.* at 347 (footnote omitted).

United States,[49] a suit brought on behalf of the Japanese-Americans interned in American concentration camps during World War II, the court held that government concealment of the absence of military necessity for the camps from the public and the Supreme Court tolled the limitations period until "an authoritative statement by one of the political branches, purporting to review the evidence when taken as a whole, could rebut the presumption articulated in *Korematsu*."[50]

Although these cases may signal a move away from strict application of the arm's length standard, no court has done more than provide an incomplete and ad hoc response to problems with the standard.[51] The *Hohri* court went so far as to couple its holding with the caveat that the facts before it were "*sui generis*," and its decision was "not the occasion to establish a new rule to govern future cases."[52] Thus, although some courts have refused to allow the plaintiffs before them to go without relief, by failing to articulate a coherent standard they have left future plaintiffs confronting government cover-up without adequate protection.

II. The Government as Trusted Defendant

Citizen allegations of government concealment demand analysis under the trusted defendant standard.[53] From the totality of its political and legal dealings with its citizens, government engenders a special respect from and gains power over many citizens that should be reflected in the tolling doctrine. Applying the trusted defendant standard to most government-citizen relationships would give courts a principled way to respond to the difficulties facing plaintiffs confronting government cover-up.

This Part will demonstrate that most government-citizen relationships include all the attributes that have prompted courts to apply the trusted defendant standard: trust,[54] an imbalance of power,[55] and the concealing party's monopoly over information relating to its wrongdoing.[56] It will then discuss federal decisions recognizing that the relationship of trust between government and citizen imposes a special duty of honesty and dis-

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49. 782 F.2d 227 (D.C. Cir. 1986).

50. *Hohri*, 782 F.2d at 251. The court stopped short of imposing a full duty of disclosure, however, holding that Congress' creation of a commission to investigate the concentration camps rather than the commission's subsequent findings was sufficient to start the limitations period. *Id.* at 253.

51. Even when circuit court panels agree to toll the limitations period, they can not always agree why. *See, e.g.*, Vest v. Bossard, 700 F.2d 600 (10th Cir. 1983) (three judge panel split three ways on why limitations should be tolled in suit alleging massive cover-up by local government officials).

52. *Hohri*, 782 F.2d at 249.

53. This Note does not argue that all citizens alleging government concealment should be analyzed under the trusted defendant standard, nor that the standard should be restricted exclusively to citizens. *See infra* note 104.

54. *See supra* note 25.

55. *See supra* note 26.

56. *See supra* note 27.

closure on government and its officials. It will conclude by explaining how the two courts that have considered and rejected the application of the trusted defendant standard to government-citizen relationships have misperceived the doctrine's scope and effect.

A. *Common Law Factors*

1. *Trust in Government*

While faith in government was eroded by Watergate and other scandals in the early Seventies, recent polls show a resurgence of trust in government[57] and in government officers.[58] No poll, of course, can gauge the symbolic power of official action.[59] The presumptive legality of government action affects a citizen's readiness to suspect the government of wrongdoing in a way that defies simple quantification. Citizens are deterred from bringing actions against the government by a complex and subtle interplay among the legal, psychological, and political factors that shape a citizen's perception of governmental authority.[60] Even a jaundiced observer of government action can evince an enduring faith in government honesty and forthrightness.[61]

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57. When posed the question, "[h]ow much of the time do you think you can trust the government in Washington to do what is right—just about always, most of the time, or only some time?," 53% of Americans in 1984 answered "most of the time," as opposed to 23% in 1980, and 27% in 1978. Center for Political Studies, American National Election Studies (1981-1985) (unpublished study) (on file with author). *See also* Clymer, *Americans in Poll View Government More Confidently*, N.Y. Times, Nov. 19, 1984, at A1, col. 4 (reporting results of study). American citizens place far greater faith in government than do citizens of other Western democracies. *See* Dionne, *Government Trust: Less in West Europe Than in U.S.*, N.Y. Times, Feb. 16, 1986, at 20, col. 1 (polls show that 49% of Americans trust government in Washington to do what is right all or most of time, and only seven percent almost never trust it to do what is right, as opposed to far lower percentages in Western Europe.). *See generally* Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L. J. 63, 95 n.111 (1985) (discussing personal nature of government-citizen relationship).

58. When asked the question, "[d]o you think that quite a few of the people running the government are a little crooked, not very many are, or do you think hardly any of them are crooked at all?," 64% of Americans in 1984 answered "not many" or "hardly any", as opposed to 49% in 1980 and 53% in 1978. Center for Political Studies, *supra*, note 57.

A recent Gallup poll designed to assess the "honesty and ethical standards" of various professions found that policemen ranked seventh of the twenty occupations tested. In response to the question, "[h]ow would you rate the honesty and ethical standards of [policemen]—very high, high, average, low, or very low?," 47% of the respondents answered high or very high, 41% said average, and only 10% answered low or very low. San Francisco Chron., Aug. 16, 1985, at 30, col. 1.

59.. *See* Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388, 391-95 (1971) (describing unique and extraordinary power of government officials).

60. *See* Allen v. United States, 588 F. Supp. 247, 343 (D. Utah 1984) (victim of government atomic testing believed that government would not conduct testing unless it knew it was safe); H. BALL, JUSTICE DOWNWIND: THE STORY OF AMERICA'S ATOMIC TESTING PROGRAM 56 (1986) (describing how Utah citizens' patriotism and faith in government inhibited their discovery that government atomic testing injured them); U.S. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 126 (1983) (social scientists believe that the Japanese-Americans interned in concentration camps were deterred from bringing legal claims by surprising super-patriotism they have labelled the "150% American Syndrome").

61. As one federal judge remarked upon discovering that government attorneys had committed

2. *An Imbalance of Power*

The imbalance of power between individual citizens and the government is obvious.[63] The government's superior position in part springs from its clear advantage in resources. Much of the government's power, however, derives from its unique ability to coerce.

The expansion of the government's provisions of goods and services in the last two decades has given the government greater leverage over many citizens.[63] A more dependent citizenry is more susceptible to government coercion and less apt to challenge government action.

Even among citizens who do not rely on government programs, the state's coercive power can greatly inhibit the accumulation of information. At times this coercive power arises from the legal prerogatives the government can bring to the litigation process. No other defendant, for example, can threaten potentially adverse informants or witnesses with prosecution.[64] Particularly on the local level, the government can exert sufficient pressure to stifle the flow of information to an injured citizen.[65]

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what he believed to be fraud upon his court in a trial over a quarter century earlier:

> [I]t is quite true that judged by modern insights I took a somewhat pristine view at the original trial of the general integrity of government officials . . . . I suppose that I shall continue to do so, despite the buffetings of Watergate, these proceedings, and other current disclosures.

Bulloch v. United States, 95 F.R.D. 123, 143 (D. Utah 1982) (Christensen, J.) (government committed fraud on court in 1956 suit by concealing evidence relating to dangerousness of atomic testing), *rev'd*, 721 F.2d 713 (10th Cir. 1983), *aff'd en banc*, 763 F.2d 1115 (10th Cir. 1985), *cert. denied* 106 S. Ct. 862 (1986). Those less intimate with litigation in the federal courts are likely to retain an even greater continuing faith in government. *See also* Barrett v. United States, 689 F.2d 324, 326 (2d Cir. 1982) ("Today's average citizen would doubtless be appalled, but probably not surprised, to learn that in the early 1950's, while conducting a chemical warfare experiment, the United States Army used certain individuals as test subjects."), *cert. denied sub nom.* Cattell v. Barrett, 462 U.S. 1131 (1983).

62. This imbalance may be exaggerated in the concealment context. Those most apt to be the victims of official concealment may be those least able to discover their claims. As Judge Weinstein has observed:

> [T]he law should take account of the fact that the people who bring these civil rights cases in the federal courts often proceed *pro se*, are ignorant of the niceties of state and federal practice, and lack the contacts with the legal profession that the more well-to-do and assured of our society rely on to prevent having claims barred by the statute of limitations.

Singleton v. City of New York, 632 F.2d 185, 196 (2d Cir. 1980) (Weinstein, J., dissenting), *cert. denied*, 450 U.S. 920 (1981).

63. The coercive power that attends government benefits can be great. *See, e.g.*, Cox v. Stanton, 529 F.2d 47, 49 (4th. Cir. 1975) (teenage mother told that continued receipt of welfare funds was contingent on consent to reversible sterilization that turned out to be irreversible). *See generally* Reich, *The New Property*, 73 YALE L. J. 733 (1964) (discussing expansion of government programs).

64. *See, e.g.*, Vest v. Bossard, 700 F.2d 600, 607 (10th Cir. 1983) (McKay, J., concurring) (local officials sent two teenagers to state correctional school for failing to comply with malicious prosecution, and threatened to prosecute a third for perjury if he recanted government fabricated accusation); Barrett v. United States, 689 F.2d 324, 328 (2d Cir. 1982) (government threatened to prosecute adverse witnesses under the Espionage Act in order to to cover up unauthorized chemical warfare testing), *cert. denied sub nom.* Cattell v. Barrett, 462 U.S. 1131 (1983).

65. In Vest v. Bossard, 700 F.2d 600 (10th Cir. 1983), for example, a judge, prosecutor, county attorney, and a probation officer wanted to force a local college professor out of town. First they forced a probationary teenager to accuse him of sodomy. When despite the threat of prosecution for

Even if they suspect government officials of wrongdoing, citizens may be reluctant to make their suspicions known, fearing (sometimes quite reasonably) that challenges to official wrongdoing will lead to retribution. This is especially likely to be true on the local level, where the suspected wrongdoer and the authority with whom one registers complaints may be closely related if not one and the same. But even if the source of wrongdoing is a distant federal government, plaintiffs may forestall inquiry out of fear.[66]

3. *The Government Monopoly on Information*

The government's powers of coercion are supplemented by its ability to keep material information secret. Unlike most defendants, the government has legitimate justifications for secrecy that it can invoke for illegitimate purposes. Only the government can thwart a civil suit for damages by claiming it cannot disclose the identity of a witness because he is an informant,[67] or avoid a court's subpoena by claiming that disclosure would endanger national security.[68] State and local governments can make similar claims in connection with their police function.[69]

The difficulty of access to government information is compounded by the fact that the government is often the only source of information about events related to its wrongdoing. As a unique entity, often performing tasks without competitors with whom its activities can be compared or from whom information can be gleaned, the government has a special

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perjury, the teenager recanted, the judge insisted that the accused professor plead guilty and spend six months in the Veterans Hospital. To insure that the professor could not talk to the recanter, the conspirators placed the teenager under police surveillance for five years. *Id.* at 607 (McKay, J., concurring).

66. To take an extreme but illustrative example, empirical evidence suggests that the Japanese-Americans interned in concentration camps during World War II did not challenge the legitimacy of the government's actions until long after they were released because they feared that such a challenge would return them to captivity. S. FUKISHIMA & K. ITO, THE EFFECTS OF RELOCATION ON THE MENTAL HEALTH OF JAPANESE-AMERICANS: EVALUATION OF THE LITERATURE AND RECOMMENDATIONS, (presented to the United States Commission on Wartime Relocation, Papers of the Commission, Part II 1983).

67. *See* Bergman v. United States, 565 F. Supp. 1353, 1358–61 (W.D. Mich. 1983) (discussing extent of privilege and citing cases).

68. *See, e.g.*, Fitzgerald v. Seamans, 553 F.2d 220, 228 (D.C. Cir. 1977) (request for information); Barrett v. United States, 689 F.2d 324, 328 (2d Cir. 1982), *cert. denied sub nom.* Cattell v. Barrett, 462 U.S. 1131 (1983) (subpoena).

69. *See* Hobson v. Wilson, 737 F.2d 1, 41 (D.C. Cir. 1985) (local police claimed law enforcement considerations required them to keep information pertaining to alleged wrongdoing secret), *cert. denied sub nom.* Brennan v. Hobson, 105 S. Ct. 1843 (1985); *see also* Bell v. Milwaukee, 746 F.2d 1205, 1216–22 (7th Cir. 1984) (discussing cover-up by Milwaukee police).

While the government's initial obligation to disclose under the Freedom of Information Act (FOIA), 5 U.S.C. § 8552 (1982), is certainly greater than the pre-discovery duties of a private litigant, once the government has reason to believe it has no disclosure obligations under the Act, it may be more bold than a private litigant in its refusals to disclose. State governments may follow a similar strategy under state analogs of FOIA.

ability to suppress information completely. For example, for years the government was the only party capable of gathering and analyzing information about the danger of the radioactive fallout from the atomic testing it conducted over Nevada and the Marshall Islands.[70] In both locations, the government was reluctant to test radiation levels; the tests it did conduct were incomplete, negligently prepared, or falsely interpreted.[71] Had the government been a private party, the plaintiffs not only would have been more suspicious, but they also might have been able to seek assistance from public authorities.[72]

Finally, when information is technically available, even diligent plaintiffs may have difficulty obtaining it. Government information, particularly data amassed by the federal government, is often distributed throughout a vast bureaucracy, and available only to those who have the time, money and expertise to locate it.[73] While at least one court has acknowledged that it "cannot impose an obligation on all citizens to initiate a triennial request of the Government" to determine whether their rights have been violated,[74] another court suggested that the plaintiff's failure to

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70. *See* Nitol v. United States, 7 Cl. Ct. 405, 410, 414 (1985) (discussing testing in Marshall Islands); Bulloch v. United States, 95 F.R.D. 123, 144 (D. Utah 1982), *rev'd*, 721 F.2d 713, *aff'd en banc*, 763 F.2d 1115 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 862 (1986) (discussing testing in Nevada); H. BALL, *supra* note 60, at 129–30, 197–98 (same).

The range of information over which the government wields a monopoly is not limited to the technologically esoteric. For example, until classified evidence became public, only the government could know whether the government believed there was a military necessity for the wartime relocation camps. *See* Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986) (tolling claim brought by Japanese-Americans interned in American concentration camps during World War II). *See generally* P. IRONS, JUSTICE AT WAR (1983) (discussing government cover-up of information about military necessity).

71. *See* cases cited *supra* note 70. *See also* STAFF OF HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 2D SESS., "THE FORGOTTEN GUINEA PIGS": A REPORT ON THE HEALTH EFFECTS OF LOW-LEVEL RADIATION SUSTAINED AS A RESULT OF THE NUCLEAR WEAPONS TESTING PROGRAM CONDUCTED BY THE UNITED STATES GOVERNMENT 22 (Comm. Print 1980) [hereinafter cited as HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS] ("the government falsely interpreted and reported radiation rates so as to give an inaccurate estimate of the hazards [and] knowingly disregarded evidence"); H. BALL, *supra* note 60, at 130, 197–98 (discussing Nevada testing).

72. The government's superior ability to conceal information is subject to two important qualifications. First, government activity is likely to be subject to greater media scrutiny than is the activity of a private party. Second, "government" is not monolithic. It is divided into at least three levels of authority—federal, state, and local—each of which are separated again into as many as three independent branches. Any of these governmental units might be able to assist a citizen concerned that a different governmental unit had concealed evidence of wrongdoing. That said, it should be noted that governmental units can use their superior ability to suppress information to keep data from the press or other governmental units. For example, the Atomic Energy Commission kept information about the danger of atomic testing in Nevada secret despite the efforts of local newspapers, local government officials, and high-level employees of the United States Department of Health, Education and Welfare (HEW). *See* H. BALL, *supra* note 60 at 67–83 (local newspapers); HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, *supra* note 71, at 6–7, 21 (state officials and HEW).

73. *See* Marcus, *supra* note 1, at 895–897 (discussing difficulty of obtaining government information).

74. Smith v. Nixon, 606 F.2d 1183, 1191 (D.C. Cir. 1979), *cert. denied*, 454 U.S. 912 (1981).

submit an information request under federal and state freedom of information acts started the limitations period.[75] One court rejected as an "aggravating factor" the fact that material government documents were dispersed in eighteen different archives in seven states.[76]

B. *The Government-Citizen Relationship in Federal Court*

1. *The Intangible Rights Doctrine*

Placing the government-citizen relationship within the trusted defendant standard would not require a radical recharacterization of the government-citizen relationship. Indeed, analyzing government concealment under the trusted defendant standard would comport with the Founder's vision of the proper relationship between government and citizen. The Lockean theory central to those who drafted the Constitution[77] envisioned a government with a "fiduciary" duty to protect its citizens.[78]

While the Founders' conception of the government-citizen relationship has not been reflected consistently in the case law,[79] their view is reflected in a line of criminal prosecutions strikingly analogous to the fraudulent concealment context. In those prosecutions, federal courts have held government and quasi-government officials to a fiduciary duty that includes the public's "intangible" right to the official's honest and faithful participation in government affairs.[80] Under this doctrine, courts have imposed

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75. Hauptmann v. Wilentz, 570 F. Supp. 351, 399 (D.N.J. 1983), *aff'd*, 770 F.2d 1070 (3d Cir. 1985).

76. Hohri v. United States, 586 F. Supp. 769, 791 (D.D.C. 1984), *rev'd on other grounds*, 782 F.2d 227 (D.C. Cir. 1986).

77. *See* G. Wood, The Creation of the American Republic: 1776–1787, at 283, 289–90, 601 (1969) (discussing Locke's influence).

78. *See* J. Locke, Second Treatise of Government § 156, at 88 (T. Peardon ed. 1979) (1st. ed. London 1690) (executive's power is "fiduciary trust" which citizens have "placed in him for the safety of the people"); *id.* § 149, at 84 (government's legislative power is "fiduciary power" or "trust" citizens have reposed); *id.* § 171, at 97 (people have "express or tacit trust" that power delegated to government "shall be employed for their good and the preservation of their property"); *See also* Peardon, *Introduction* to J. Locke, Second Treatise of Government, at xv (Locke believed government owed fiduciary duty or duty of trust to people); *see also* Hohri v. United States, 782 F.2d 227, 256 (D.C. Cir. 1986) (the Founders "most certainly assumed that the leaders of this Republic would act truthfully").

79. *See* Ackerman v. United States, 340 U.S. 193, 198 (1950) (no fiduciary relationship between government officer and naturalized citizen).

80. *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 120–23 (2d Cir. 1982) (quasi-public official violated mail fraud statute by taking private interest in public project and by failing to meet affirmative duty to disclose material information surrounding his activities), *cert. denied*, 461 U.S. 913 (1983); United States v. Mandel, 591 F.2d 1347, 1358 (4th Cir.) (governor violated mail fraud statute by failing to disclose material information surrounding his interest in public project, and offering deliberately misleading statement to public body), *aff'd en banc in relevant part*, 602 F.2d 653 (1979), *cert. denied*, 445 U.S. 961 (1980); United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976) (building commissioner's acceptance of kickbacks violated mail fraud statute by denying public's intangible right to honest and faithful service); *cf.* Coffee, *supra* note 23, at 143 (criticizing above decisions for turning mail fraud statute into " 'Truth-in-Government' Act").

upon a wide range of public officials a duty to disclose information about their wrongdoing,[81] and have held that failure to disclose breaches the official's duty to the public.[82] An official's concealment is actionable under the mail fraud statute[83] and under the common law.[84]

These decisions amount to a criminalization of fraudulent concealment when committed to further individual rather than "official" wrongdoing. Indeed, the term "fraudulent concealment" has been used to describe these offenses.[85] The holdings are animated by the belief that the government has a duty to be faithful to the trust that citizens have vested in it. As the Second Circuit noted:

> Justice Holmes once wrote that "[m]en must turn square corners when they deal with the government." It requires little imaginative leap to conclude that individuals who in reality or effect are the government owe a fiduciary duty to the citizenry.[86]

It takes an equally small imaginative leap to recognize that this principle is as applicable in the tolling context as it is in criminal prosecutions. If a government officer's fraudulent concealment is sufficient to send him to jail, government concealment should be sufficient to stop the statute of limitations from running in a civil claim.

While no federal court has made this connection, the Supreme Court of Illinois has applied the intangible-rights rationale in the tolling context. In *Chicago Park District v. Kenroy, Inc.*,[87] the court applied the trusted defendant standard in a case brought by the City of Chicago against an alderman. The Court held that the alderman owed a fiduciary duty to the city, and held that his failure to disclose wrongdoing constituted fraudulent concealment, tolling the limitations period.[88]

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81. *See Margiotta*, 688 F.2d at 142 (Winter, J., dissenting) (the courts have brought "virtually all participants in government and politics under the rubric fiduciary").

82. *See, e.g., Mandel*, 591 F.2d at 1363.

83. *See* cases cited *supra* note 80.

84. *Mandel* held:

> a duty to disclose material information need not necessarily be based upon the existence of some statute or regulation prescribing such a duty. Rather, the duty to disclose may exist because of the relationship between the one possessing the material information and another . . . . So far as relevant in this case, the Governor of the State of Maryland is trustee for the citizens and the State of Maryland and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty.

591 F.2d at 1363.

85. *Mandel*, 591 F.2d at 1355.

86. *Margiotta*, 688 F.2d at 124 (citations omitted).

87. 78 Ill. 2d 555, 402 N.E.2d 181 (1980).

88. *Id.* at 563, 402 N.E.2d at 185 ("To hold that the City was obligated to search for the misfeasance of its duly elected public official, absent a prior indication of wrongdoing, would require it to presume unfaithfulness on the part of its fiduciary.").

2. *The Trusted Defendant Standard in Federal Court*

The two federal courts that have considered the argument that the trusted defendant standard should be applied to government-citizen relationships both refused to depart from the arm's length standard.[89] Neither court, however, appears to have understood the range of relationships to which the trusted defendant standard applies. The courts did not apply the factors generally used to determine the tolling standard.[90] Instead, both courts apparently assumed that the trusted defendant standard applies only to strict fiduciary relationships[91] and based their holdings on the grounds that the government is not the citizen's fiduciary.[92]

In both instances, the refusal to adopt the trusted defendant standard seems animated by an unfounded fear that to do so would expose the government to an expansive range of new duties and liabilities.[93] Both

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89. Hohri v. United States, 586 F. Supp. 769, 791-93 (D.D.C 1984), *rev'd on other grounds*, 782 F.2d 227 (D.C. Cir. 1986); Barrett v. Hoffman, 521 F. Supp. 307, 315 (S.D.N.Y. 1981), *rev'd on other grounds sub nom.* Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), *cert. denied sub nom.* Cattel v. Barrett, 462 U.S. 1131 (1983). The *Barrett* holding was complicated, however, by the fact that the court considered the duties that emanate from the government-citizen relationship in conjunction with plaintiff's argument that those duties also emanate from the due process clause. *Id.* at 314-15; *see infra* note 97 (discussing *Barrett* due process analysis).

Only in cases brought by Native Americans, to whom the government has a fiduciary duty imposed by statute, have the courts wavered in their application of the arm's length standard. *See, e.g.*, Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973) (tolling statute of limitations).

90. *See supra* text accompanying notes 26-28.

91. *Hohri*, 586 F. Supp. at 791; *Barrett*, 521 F. Supp. at 315. The *Hohri* court showed its lack of understanding of the types of relationships subsumed under the trusted defendant standard by addressing the question of whether the government-citizen relationship affected the tolling decision in its discussion of whether the government was liable for damages caused by an alleged breach of fiduciary duty. 586 F. Supp. at 792-93.

92. *Hohri*, 586 F. Supp. at 791-93; *Barrett*, 521 F. Supp. at 315; *see also* Smith v. Nixon, 606 F.2d 1183, 1190 (D.C. Cir. 1979) (commenting in dictum that no "formal" fiduciary relationship existed between parties in Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977), a middle level Department of Defense employee and a White House official), *cert. denied*, 453 U.S. 912 (1981).

As additional support for its decision, the *Barrett* court cited its finding that the government is subject to the same discovery rules and civil sanctions as any other litigant in the federal courts. 521 F. Supp. at 315. As a basis for refusing to apply the trusted defendant standard this reasoning is flawed for two reasons. First, the validity of the statement itself is undermined by the very case relied upon by *Barrett* to support it: NAACP, Western Region v. Hodgson, 57 F.R.D. 81 (D.D.C. 1972). That case recognized the specialness of the government in its holding that the "paramount interests of the Government in having justice done between litigants in the federal courts militates in favor of requiring great effort on its part to produce any documents relevant to a fair determination of this litigation." *Id.* at 83 (quoting Freeman v. Seligson, 405 F.2d 1326, 1337-38 (D.C. Cir. 1968)).

Second, the court's reliance on discovery doctrine confuses the tolling decision's concern with events before suit is filed with the rules governing actions after a suit is filed. Discovery doctrine is not relevant to whether the trusted defendant standard is applicable. *See supra* text accompanying notes 25-26.

93. The *Hohri* court considered the tolling argument in the context of a damages claim for breach of fiduciary duty. *See supra* note 91. The *Barrett* court considered the tolling argument in the context of plaintiff's claim that the government had a constitutional obligation to disclose its wrongdoing, *see infra* note 97, and that the cover-up should give rise to a cause of action for damages under the Fifth Amendment. *Barrett*, 521 F. Supp. at 315.

courts' rigid reliance on the arm's length standard resulted in reversal on appeal, where the circuit courts, without addressing the question of which tolling standard should be applied, found ways nominally under the arm's length standard to reverse the trial courts' holdings.[94]

III. Constitutional Rights Threatened by Government Concealment

An important additional reason to analyze government cover-up under the trusted defendant standard is that in many instances use of the arm's length standard will deprive a litigant of his constitutionally protected right of access to court. In *Logan v. Zimmerman Brush Co.*,[95] the Supreme Court held that a cause of action is a species of property under the due process clause.[96] Under the *Logan* analysis, government cover-up, by depriving a citizen of his property interest in his cause of action, may abridge his procedural right of access to court.[97]

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94. Hohri v. United States, 782 F.2d 227, 253 (D.C. Cir. 1986) (tolling limitations period under arm's length doctrine); Barrett v. United States, 689 F.2d 324, 330, 333 (2d Cir. 1982) (reversing summary judgment in favor of government under arm's length doctrine and due process analysis), *cert. denied sub. nom.* Cattell v. Barrett, 462 U.S. 1131 (1983). For a discussion of courts' tendency to keep claims alive by making ad hoc alterations in the arm's length doctrine, see *supra* text accompanying notes 44–52. For a discussion of the *Barrett* court's due process analysis, see *infra* note 97.

95. 455 U.S. 422 (1982) (Illinois procedure barring suit under state antidiscrimination statute within limitations period violated constitutional right to due process).

96. *Id.* at 428.

97. The procedural due process argument suggested here is similar to that set forth in Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 Harv. L. Rev. 1683, 1692–95 (1983) (statutes of repose governing toxic tort suits deprive plaintiffs of constitutional right of access to court absent legislative *quid pro quo*).

Two additional constitutional theories support application of the trusted defendant standard to the government. Both arguments proceed from the court's holding in *Logan* that a plaintiff has a constitutionally significant property right in his cause of action. From this premise the first argument asserts that government cover-up implicates constitutional rights in a way that concealment by other parties does not. It concludes that the importance of safeguarding constitutional rights and applying uniform constitutional standards, *see* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring), mandates that courts employ the trusted defendant standard because it is the only standard that accurately and consistently reflects the difficulties a plaintiff confronts when faced with government concealment. *See supra* text accompanying notes 53–76.

The second alternative is that government cover-up constitutes a deprivation of substantive due process. This argument also can be based on *Logan*, which some commentators characterize as a substantive due process case masquerading as a case about procedural rights. *See, e.g.*, *The Supreme Court, 1981 Term*, 96 Harv. L. Rev. 62, 102–105 (1982). According to this line of reasoning, just as *Logan* found that Illinois had taken Logan's constitutionally imbued property right by depriving him of his right to sue under the state's antidiscrimination statute, so the government deprives a citizen of his constitutional property right when it conceals his cause of action. This theory apparently informed the decision in Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), *cert. denied sub nom.* Cattell v. Barrett, 462 U.S. 1131 (1983), where the court held that plaintiffs could bring an action under § 1983 to recover the difference between the money they had received in a settlement and the money they would have recovered had government concealment not inhibited their ability to take full advantage of the legal claims available to them. *Id.* at 331–33. The court's cursory treatment of this issue, however, left the rationale and implications of its decision unclear. The major flaw in the substantive due process argument is that it knows no bounds: It implies that each instance of govern-

As the *Logan* court explained, the constitutional right of access to court is premised on the principle that, "having made access to court an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the governmental scheme."[98] More specifically, the Court has held that a constitutional right of access to court exists where, "absent a countervailing interest of overriding significance," a plaintiff seeks to vindicate a fundamental right and the court is the only forum in which that right can be vindicated.[99]

In the fraudulent concealment context, a constitutional right of access could be asserted by a plaintiff who seeks to vindicate his fundamental interest in personal security and bodily integrity[100] jeopardized by a concealed government tort where redress outside the courtroom is unavailable.[101] When government action threatens that fundamental interest and the government can prove no overriding state interest, a constitutional right of access should protect plaintiff's cause of action.

Logan and the access to court cases do not establish an exact formula for deciding how the test balancing competing governmental and private interests should be calculated. When a plaintiff alleges government concealment, however, tolling doctrine itself provides the proper test. Constitutional issues aside, the tolling decision always involves balancing competing interests: The citizen's interest in holding the government

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ment cover-up would toll the statute of limitations, regardless of the identity of the plaintiff or the character of the plaintiff's relationship with the government.

98. *Logan*, 455 U.S. 430 n.5.

99. *Id.* (quoting Boddie v. Connecticut, 401 U.S. 371, 377 (1971)). In *Boddie*, the court held that a class of indigent women seeking to waive court fees in order to obtain divorces had a constitutional right of access to court. The *Boddie* holding subsequently was clarified by United States v. Kras, 409 U.S. 434 (1973), in which the court held that in order to assert a constitutional right of access to court a plaintiff must seek to vindicate a fundamental interest, and the state must have exclusive control over the "adjustment of [the] legal relationship." *Id.* at 445. In *Logan*, the access to court cases were presented as an "analogous method of analysis" in support of the Court's decision declaring unconstitutional the Illinois procedure that denied plaintiff his right to bring suit under a state anti-discrimination statute. *Logan*, 455 U.S. at 430 n.5.

100. *See* Ingraham v. Wright, 430 U.S. 651, 673 (1977) ("Among the historic liberties . . . protected [by the Due Process Clause] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."); *see also id.* at nn.41–42; Note, *supra* note 97, at 1693 (fundamental interest in personal security and bodily integrity threatened by statutes of repose for toxic tort suits).

101. Few prospective litigants are able to secure a remedy outside the courtroom. Without a valid remedy in court, an individual has no leverage with which to negotiate a private settlement. The only remaining non-judicial forum in which the prospective litigant might secure relief is the legislature. It is enormously difficult, however, to secure legislative relief for a specific injury sustained as a result of government action. Even the citizens injured by government atomic testing in the 1950's, whose injuries have been well-publicized, confirmed by a congressional report, and championed by state and federal elected officials, have been unable to secure relief from Congress. H. BALL, *supra* note 60, at 130–32, 177 (discussing failed legislative attempts). Legislators "are wary of having a compensation program turn into a continuing, disruptive, draining entitlement program for other groups in the society who have also been injured and wrongfully killed due to government negligence." *Id.* at 177.

responsible for its wrongdoing is weighed against the government's interest in being free of stale claims.[102] The citizen's constitutional right of access to court requires an adjustment in how the balance is struck. In a case involving government concealment, the trusted defendant standard provides the adjustment needed to take account of that constitutional dimension. To apply the arm's length test—in other words, not to adjust the tolling standard—would ignore the constitutional issue. The balance struck by the trusted defendant standard comports with the directive of the constitutional test that "absent a countervailing interest of overriding significance,"[103] a citizen should have access to a judicial forum in which to assert his property right. In short, the trusted defendant standard test satisfies the due process clause as well as traditional tolling principles.

IV. Employing the Trusted Defendant Standard

A. *The Trusted Defendant Standard in Practice*

Courts should account for the special relationship between government and citizen and the citizen's right of access to court when assessing claims of government cover-up. Accordingly, in the absence of evidence showing that a plaintiff deals with the government at arm's length,[104] courts should apply the trusted defendant standard when assessing claims by citizens alleging government cover-up.[105] The government should be under a duty

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102. *See supra* text accompanying notes 1–11.

103. *Logan*, 455 U.S. at 430 n.5 (citation omitted) (stating test).

104. The trusted defendant standard should not automatically apply to all citizens alleging government concealment, nor should it be restricted to citizens. The standard has always found categorizations useful, but not dispositive. *See supra* notes 28–29 and accompanying text. It is likely, however, that the standard would apply to most government-citizen relationships, and would not apply to suits not brought by individual citizens. The standard would be entirely inappropriate, for example, in the context of commercial relations between a large corporation and the government. Corporations and other large organizations simply do not have a relationship with government which inspires the kind of trust required for application of the trusted defendant standard. In addition, while few organizations can match the resources of the federal government, most organizations will not suffer from the same debilitating disadvantages that face a citizen trying to uncover government wrongdoing.

Among private citizens, too, the difficulty of uncovering government information will differ. Unlike the government-business relationship, however, it should be presumed that the citizen's relationship with the government places him at a grave disadvantage. For citizens for whom this is clearly not true, the doctrine affords sufficient flexibility to deny application of the trusted defendant standard. *See supra* text accompanying note 29 (discussing standard's flexibility).

While this distinction between citizens and corporations cannot be exact, in general it is consonant with a presumption that parties who deal on a commercial basis are subject to a more exacting tolling standard. *See Developments*, *supra* note 20, at 1217 (there is "an even stronger policy against requiring the suspicious attitude of diligence exacted of persons dealing on a commercial basis").

105. For a more elaborate discussion of the theory and mechanics of the trusted defendant standard, see *supra* text accompanying notes 18–29. Another possible substitute for the arm's length doctrine is the doctrine of estoppel. One federal court has held that the government's concealment estops it from raising a limitations defense. Bell v. City of Milwaukee, 746 F.2d 1205, 1231 (7th Cir. 1984) (applying Wisconsin law). Unlike the equitable tolling proposed in this Note, however, estoppel does not provide a broadly applicable solution to the problem of government concealment. Estoppel is less

to disclose its wrongdoing.[106] Its failure to disclose wrongdoing, or its false denial of wrongdoing, should constitute fraudulent concealment, tolling the statute of limitations. The limitations period should remain tolled until the plaintiff discovers, or should have discovered, the concealed cause of action.[107] In the determination of when the citizen should have discovered

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likely to find general approval, and would only apply to a limited spectrum of government concealment on a deliberately ad hoc basis.

While courts will toll actions against the government, *see* note 31 (citing cases), as a general principle courts are extremely reluctant to estop the government. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.01, at 491–92 (1958) ("courts usually hold that the doctrine of equitable estoppel does not apply to the government"); Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 551 (1979) ("[t]raditionally, courts have not permitted estoppel of the government, no matter how compelling the circumstances"); *see also* Heckler v. Community Health Services, 467 U.S. 51, 60 (1984) (Court is "hesitant . . . to say there are no cases" in which estoppel of government would be appropriate) (emphasis omitted). The hostility to estoppel of government is based in large part on tradition. K. DAVIS, *supra*, § 17.01, at 491. In addition, it has been argued that the general public should not suffer for the misrepresentations or mistakes of its agents, and that estoppel of government, by rendering the government incapable of enforcing the law, would undermine obedience to the rule of law. *See Community Health Services*, 467 U.S. at 60; *see also* Note, *supra*, at 565–67 (possible separation of powers problems involved in estoppel of government).

Another important advantage to the tolling approach is that whereas the doctrine of estoppel cannot be used to assert a limitations defense in a suit under the Federal Tort Claims Act, tolling is proper. *See, e.g.*, Hohri v. United States, 586 F. Supp. 769, 786 n.22 (D.D.C. 1985), *rev'd on other grounds*, 782 F.2d 227 (D.C. Cir. 1986); Barrett v. Hoffman, 521 F. Supp. 307, 320 (S.D.N.Y. 1981), *rev'd on other grounds sub nom.* Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), *cert. denied sub nom.* Cattell v. Barrett, 462 U.S. 1131 (1983). This is because the limitations period that governs the FTCA claim requirement is jurisdictional, and parties cannot create jurisdiction by their actions. *Hohri*, 586 F. Supp. at 786 n. 22; *Barrett*, 521 F. Supp. at 320 n. 17.

Finally, estoppel would only bar the government from asserting a limitations defense when it affirmatively denied or misrepresented its role in any wrongdoing. *See Community Health Services*, 467 U.S. at 59. The tolling approach advocated here also would apply to "self-concealing" torts. *See supra* text accompanying notes 2–6. In addition, it would impose on government a duty of disclosure. *See infra* text accompanying note 106.

106. *See supra* text accompanying note 20. It is important to emphasize that disclosure is not an admission of liability; it simply provides the plaintiff with full information about government activities in which he may have a direct interest. Obviously, if the government is intent on concealing information, or if it feels that the costs of disclosure are too great, then the duty to disclose will become a constructive duty, and will serve the purpose of tolling the limitations until a plaintiff knows or should have known of any claim.

The nature of the wrongdoing and the number of citizens potentially at risk will affect the requirements of notice. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–45 (1950); Spevack v. United States, 390 F.2d 977, 982–84 (Ct. Cl. 1968) (government had not put scientist on notice of expropriation of his formula simply by declassifying evidence that they had used it, and could only provide proper notice by making a public announcement reasonably calculated to get his attention). The standard established by *Spevack* should govern the government's disclosure duties, though it would be disingenuous to suggest that any standard of disclosure can do more than give courts a guide to decisions that will turn on the particularized facts of individual cases.

107. The burden of proving due diligence has traditionally remained with the plaintiff, as the party seeking to toll the limitations period. *See, e.g.*, Ramsey v. Culpepper, 738 F.2d 1092, 1098 (10th Cir. 1984); *see also* Gibson v. United States, 781 F.2d 1334, 1345 (9th Cir. 1986) (dismissing allegation of fraudulent concealment in part because plaintiff failed to allege due diligence). *But see* Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984) (defendant has the burden of proving absence of due diligence in the D.C. Circuit), *cert. denied sub nom.* Brennan v. Hobson, 105 S. Ct. 1843 (1985). For this reason, and because the plaintiff is the party best able to bring evidence of his diligence before the court, this Note advocates leaving the burden of proof with the plaintiff. The difficulties facing a plaintiff confronting government concealment are better addressed through the less rigorous standard of diligence required by the trusted defendant tolling standard.

the government's malfeasance, the citizen should be under no duty to mistrust the government, or suspect it of wrongdoing. Finally, the application of the trusted defendant standard should not alter the legal relationship between government and citizen in any other way. Aside from determining when the limitations period begins to run, the trusted defendant standard should not impose on government any new duties, obligations, or liabilities.[108]

B. *Achieving Larger Goals*

Applying the trusted defendant standard to citizen-government relationships will not only more accurately assess when the limitations period should run on a citizen's suit, but will serve larger social purposes as well. On a practical level, by increasing the likelihood that the government and its officers will be held accountable for their torts, application of the standard will deter government wrongdoing, help compensate victims of government cover-up, and spread the loss of any harm incurred.

More important, by compelling government disclosure and ceasing to penalize citizens for their trust in government, the standard would strengthen the relationship between government and citizen and foster greater faith in government honesty and forthrightness. The law would not only reflect the trust citizens place in government, but would encourage that trust.[109]

Finally, holding government accountable for its wrongdoings preserves the moral basis of the rule of law.[110] As Justice Brandeis wrote:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Gov-

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The government, however, should have the burden of going forward with evidence that it has disclosed information sufficient to put a plaintiff on notice of his claim; the government is clearly the party best able to bring this evidence before the court. *See, e.g.*, Smith v. Nixon, 606 F.2d 1183, 1191 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981).

108. Under the proposed change, the statute of limitations would remain "a defense separate from the denial of breach of duty." United States v. Kubrick, 444 U.S. 111, 125 (1979).

109. As Professor Dalton has written:

> At its best, the connection between the people and their government is rather like a personal relationship. It is built on mutual need, mutual trust, give and take, shared responsibilities, and an irrational element that looks a lot like love. It is that relationship more than (or over and above) fear of punishment that makes people law-abiding, loyal, patriotic, and optimistic. I am convinced that the relationship is deepened whenever a government takes the people into its confidence, levels with them, and trusts them to make hard choices. Certainly the converse is true, as both Viet Nam and Watergate vividly demonstrate.

Dalton, *supra* note 57, at 95 n.111.

110. P. Schuck, Suing Government: Citizen Remedies for Official Wrongs 23 (1983) (discussing benefits of holding government liable for its torts).

> ernment becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[111]

When application of the arm's length standard allows the government to plead the statute of limitations successfully, the government's legal victory is society's loss.[112]

Conclusion

The citizen's trust in government and the government's ability to conceal information create difficulties for the citizen that are not accounted for in the arm's length tolling standard federal courts presently apply to citizen allegations of government concealment. Analyzing citizen allegations of government concealment under the trusted defendant standard will enable those courts that have been sensitive to the unique characteristics of government concealment to ground their tolling decisions in an established legal doctrine in a manner that will provide guidance for future courts and remedies for future plaintiffs. It will also make those courts previously strict in the application of concealment doctrine, or blind to the peculiar factors involved in government cover-up, take notice of the difficulties facing a plaintiff seeking to uncover government-held and concealed information. The law should not only reflect citizen trust in government, but should encourage that trust by fostering government honesty and forthrightness.

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111. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

112. Judge Jenkins, who presided over Allen v. United States, 588 F. Supp 247 (D. Utah 1984), in which the statute of limitations was tolled because government concealment prevented discovery of injuries suffered as a result of government atomic testing, has expressed a similar idea. In cases like *Allen*, he said, the question is never will the government "*win* or lose. The government always wins when justice is done . . . ." *See* Jenkins, *Remarks Before Joint Meeting*, 10 Utah B. J. 1, 4 (1982).

REASON FOR GRANTING THE WRIT

The petition for Writ of Certiorari should be granted in order to insure equal rights for the citizen-soldier for protection of his "Due Process" provided by Government Regulation, Uniform Code of Military Justice, and Federal Statutes; and, safeguard his Constitutional "Procedural Due Process" rights guaranteed by the I, II, IV, V, VII, VIII and XIV Amendments of the Constitution of the United States of America; and, reasons stated within this Petition; and, specifically, statement of the case, with attached addentum by Saul B. Shapiro.

Prevention of Conspiracies within the Government and Military establishment of illegal, wrongful, fraudulent, cover-up actions concealed within classified "SEQUESTERED" record; and,

The Courts vary in degrees of decision(s) concerning "Due Process" by jurisdiction and local customs--military by nature of the service, custom, traditions must be protected by the

Constitutional provisions they are swore to defend, equally; without condoning fraud, deception, concealment, and intentional violations of Federal Statute and Government Regulations issued by the Secretary of the Service(s) must be complied with by the Military establishment, and provisions by Statute of the Congress directing service Secretaries must also be complied with, to include standard procedures, and requirement to correct error and/or injustice based on the merits of the case when error is discovered it is necessary to correct an error or remove an injustice as the intent of Congress, by a board, is authorized to waiver-excuse untimely filing in light of justice. Sec 131 of the Legislative Reorganization Act of 1946 (60 Stat. 831; 2 U.S.C. 190g)-- Sec 1552, Title 10 U.S.C. codifies as stated Sec 207, as amended.

The citizen's trust in government and the government's ability to conceal information create difficulties for the

citizen/military that are not accounted for in the arm's length tolling standard federal courts presently apply to citizen allegations of government concealment. Analyzing citizen/military allegations of government concealment under the trusted defendant standard will enable those courts that have been sensitive to the unique characteristics of government concealment to ground their tolling decisions in an established legal doctrine in a manner that will provide guidance for future courts and remedies for future plaintiffs. It will also make those courts previously strict in the application of concealment doctrine, or blind to the peculiar factors involved in government cover-up, take notice of the difficulties facing a plaintiff seeking to uncover government-held and concealed information. The law should not only reflect citizen/military trust in government, but should encourage that trust by fostering government honesty and forthrightness.

The U.S. Court of Appeals for the Federal Circuit entered its judgment in the case on Oct 20 1986. The jurisdiction of the Court is invoked under Title 28 U.S.C. 1254(1), 2501, 5706; 10 U.S.C. Sec 1552; and Rule 17 of the United States Supreme Court Rules.

ARGUMENT

Violation of AR 15-185 and U.S.C. 10 Sec 1552, basis of the "Secretary of each armed for-ces" is provided authority to correct records of his department where, in his judgement, it is necessary to correct an error or to remove an injustice is remedial in nature and imposes on the Secretary the duty to properly evaluate the nature of any error or injustice and, in addition to take such corrective action as will appro-priately and fully erase such error or compensate such injustice. Caddington v. U.S. 5, 1959 178 F Supp, 604, 147 Ct Cl 629. Also, see 1952 Op Atty Gen March 20. 10 U.S.C., Sec 1552 (APX P-235).

The Secretaries of the various military services are bound by their own regulations: Biddle v. U.S. 1968, 186 Ct

Cl 87 --disregarding this Court decision; the Army violated their respective AR(s): 15-6, 15-185, 20-1, 135-173, and 135-215, 640-98 , by fraud and concealment.

In Allen v. U.S., 588 F. Supp 247 (D Utah 1984), the "statute of limitations" (SOL) is tolled because of government concealment prevented discovery of injuries suffered as a result of government atomic testing, has expressed a similar idea in applying this theory to Petitioner's "IG" SEQUESTERED record.

In the case of Hohri v. U.S., 782 F.2d 227, 248 (DC Cir) (1986). The Hohri Court considered the tolling argument in the context of damages claimed for breach of fiduciary duty. The Barrett court considered the tolling argument in the context of plaintiff's claim that the government has a "constitutional obligation" to disclose its wrongdoing and that the "cover-up" should give rise to a cause of action for damages under the 5th Amendment. Barrett 521 F Supp at 315.

It must be assumed that the soldier's relationship with the military places him at a grave disadvantage. The arm's length doctrine of estoppel, one the Court has been requested to impose, has held that the government's concealment estop's applying equitable estoppel by misrepresentation preventing it from raising a limitation in defense. Bell v. City of Milwaukee, 746 F.2d 1205, 1231 (7th Cir (1984))

Pursuant to "Truth in Government Act" a duty to disclose material information need not necessarily be based upon the existence of some statute or regulation prescribing such a duty. Rather, the duty to disclose may exist because of the relationship between the one possessing the material information and another. So far as relevant in this case, the IG of the Army had a specific duty entrusted by AR 20-1 to advise Petitioner upon <u>completion</u> of his investigation to submit <u>further</u> statements, etc. (See Par 16, TBIG 4, 16

Jul 1958) (APX P-235).

Petitioner was illegally, wrongfully, and fraudulently separated from active duty by "SHAM" of the ADB "annual screening AR 135-173" basis of "for cause" recommendation of Inspector General, Report of Investigation findings, conclusion and recommendation without "due process" afforded by Respondent's Army Regulations: 15-1 (Incl 1, TAB "O"), 20-1 (App 15), 135-173 (App 4), 135-215 (App 12), 640-98 (App 25), and Uniform Code of Military Justice; and Federal Statute, U.S.C. 10, Sec 5706. See Weiss v. U.S. Ct Cl 205-65, FCR 2.S. 416,(1969). Biddle v. U.S. (Incl 1, TAB "J").

Petitioner was denied his "procedural due process" rights guaranteed by Article VII, Constitution of the United States, 1st, 4th, 5th, 7th, 8th and 14th Amendments (APX P-218).

The ADB did illegally revoke petitioner's "Indefinite Service Agreement" on active duty, (APP-91)

without verification of the record, or consideration of the most recent service (contained in letter of 19 Mar 1960 (APP-92) "held in abeyance" by PMG) and basis of illegal "Brief" of TIGO dtd 13 May 1960, CMT 1 (App 206) in conspiracy with TAGO (DESPER) and OPMG, containing fraudulent information, prejudiced, and "adverse" improper not qualified in accordance with AR 640-98. (App 25).

Petitioner requests the Court to recognize and accept the statement of the case with attached "Verbatim Addendum" Yale Law Journal by Mr. Saul B. Shiparo "Amicus Curiae"; accordance with Gideon V. Wainright"; and the following supplemental cases:

In Allen v. U.S. 588 F Supp 247, 341 (D Utah 1984), Judge Jenkins, who presided over Allen v. U.S. stated "the statute of limitations" was tolled because government concealment prevented discovery of injuries as a result of goverment." --"the question is "never" will the government win or lose. The

government always wins when justice is done.." See Jenkins remarks before joint meeting, 10 Utah B.J. 1, 4, (1982).

In Doneghy v. U.S. 220 Ct Cl 4/20/79 (pg 635) 581-77 "validity of release effect suspension of favorable personnel action and recommendation of elimination proceedings, this applies to Petitioner's case as it effected his reinstatement, volunteer Vietnam, and promotions.

In Furlong v. U.S. 153 Ct Cl 557-563 (1961) 153 Ct Cl 380 (Armed Service Key 13.5(5), 23.4(1). "A man might be considered sufficiently fit to remain on AD, but at the same time not qualified for original appointment".. same applies Petitioner's separation 1 Oct 70. PEB found questionably unfit "recommended" continued AD disapproved by DA-DESPER.

Military Personnel must not be barred from redress in civilian courts for constitutional wrongs suffered in the course of miltiary service.

In Chappell v. Wallace, 462 U.S. 297, 103 S. Ct 2362, 2366 (1983), this

Court clearly "provides for the review and remedy of complaints and grievances such as those presented by" petitioner. Chappell v. Wallace directed grievances by military personnel to be presented pursuant to 10 U.S.C. Section 938 and Section 1552(a) complaint and before the BCMR, respectively, while recognizing that decisions of the BCMR are subject to judicial review.

> This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service citing Brown v Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

103 S.Ct. at 2367, See also, Harmon v. Brucher, 355 U.S. 579, (1958).

In Secretary of the Navy v. Huff, 444 U.S. 453 (1980) (per curiam), this

Court, in deciding a case involving allegations of denials of First and Fifth Amendment rights to "expression," noted that:

> [R]egulations in each Armed Service were promulgated under a (DOD) directive that "Advises commanders to preserve servicemen's right to expression...to the maximum extent possible, consistent with good order and discipline and the national security." Brown v. Glines, ante, at 355. A member of the service who thinks that his commander has misapplied the regulations can seek remedies within the service. Furthermore, the federal courts are open to assure that, in applying the regulations commanders do not abuse the discretion necessarily vested in them.

It is this assurance petitioner invokes from the federal courts.

In Colson v. Bradley, 477 F.2d 539(8th Cir. 1973), the court reversed

the district court for not issuing a writ of mandamus where the plaintiff had proven that his superiors had failed to follow their own regulations in regard to investigation of complaints, 477 F.2d at 641-2. The trial court, whose opinion was relied upon below, recognized the conflict with Colson v. Bradley.

Case law holds that the courts should abstain from intervening into a particular military decision until an "appropriate time." Turner v. Calloway, 371 F.Supp. 188, 192-3(D.D.C. 1974)). Two of the remedies courts have required service members to exhaust is the Article 138 Complaint and BCMR proceedings. Reviewability of BCMR proceedings has a settled case history. Geyer v. Marsh, 782 F.2d 1351(5th Cir. 1986); Powell v. Marsh. 560 F.Supp.636(D.D.C. 1983); Grieg v. United States, 640 F.2d 1261 (Ct.Cl. 1981), cert. denied, 455 U.S. 907 (1982); Heisig v. United States, 719 F.2d 1153 (Fed.Cir. 1983). There have been cases where the service member atttempted to

pursue an Article 138 remedy, could not so resolve the dispute, and successfully sought review in federal court. Turner v. Calloway, supra; MacKay v. Hoffman, 403 F.Supp. 467(D.D.C. 1975); Allen v. Monger, 404 F.Supp. 1081 (N.D.Ca. 1975); United States ex. rel. Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969); Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). In several cases the federal courts have simply afforded plaintiff review of a complaint without any discussion of the basis of jurisdiction. Schatten v. United States, 419 F.2d 187 (6th Cir.1969); Colson v. Bradley, supra; United States ex. rel. Gaston v. Cassidy, 296 F.Supp. 986(E.D.N.Y. 1969).

The most thorough test, for determining when federal courts will review military decision, which has been cited favorably by numerous jurisdictions, and from which many jurisdictions take guidance, is the Mindes test. Mindes v. Seaman, 453 F.2d

197 (5th Cir. 1971). The Mindes test is very protective of military autonomy in that it requires that

> a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice remedies.

Mindes, 453, F.2d at 201. Once a plaintiff meets both of these requirements, the court must, under Mindes, "examine the substance of that allegation in light of the policy reasons behind nonreview of military matters," including: (1) the nature and strength of the plaintiff's challenge to the military determination, (2) the potential injury to the plaintiff if review is refused, (3) the type and degree of anticipated interference with the military function, and (4) the extent to which the exercise

of military expertise or discretion is involved.

Petitioner has met the requirements of the Mindes test for judicial review of constitutional violations in the proceedings. Petitioner has asserted that the Complaint investigation violated the due process clause of the Fifth Amendment and that his and other's First Amendment rights were violated, as well as asserting that there have been statutory and regulatory violations. Since petitioner had exhausted his administrative rememdies, he had satisfied both initial Mindes requirements.

The basic nature of petitioner's claims, as stated above, are important, and since they involve the Army's own regulations and Congressional legislation protecting service members' rights, they are fully capable of supporting judicial review. Refusal to review perpetuates "command influence," retaliatory actions and has an "adverse effect" on service members' freedom of expression. A

decision in petitioner's favor will mean that respondents must obey the law. Petitioner's claims are that numerous regulations and statutes promulgeted specifically for the protection of service members' rights were violated in the process of a service member invoking their protection. Finally, petitioner is not asking the courts to substitute their expertise or discretion in a peculiarly military matter, but to determine whether his claims of violations in the investigation were correct, a task which courts are created to do. The factors in the Mindes test balance in favor of judicial review.

The test was used in Wallace v. Chappell, 661 F.2d 729(9th Cir. 1981), which this Court reversed on other grounds, 462 U.S. 297, 103 S.Ct. 2363 (1983), with the recognition that the plaintiffs in the case had not exhausted their intraservice remedies, 103 S.Ct. at 2366. The Mindes test has survived the decision of Chappell v. Wallace in

several cases. Navas v. Gonzalex-Vales, 752 F.2d 765 (1st Cir. 1985); Penagaricano v. Llenza, 747 F.2d 55(1st Cir. 1984); Trerice v. Pedersen, 769 F.2d 1398 (9th Cir. 1985); Gonzalex v. Department of the Army, 718 F.2d 926 (9th Cir. 1983); Williams v. Wilson, 762 F.2d 357 (4th Cir.1985), but cf. Bluth v. Laird, 435 F.2d 1065 (4thCir.1970) (justicability of claimed violation of military regulations assumed where intraservice administrative remedies exhausted.

The Federal Circuit, although it has not applied the Mindes test itself, has cited the case with approval but, critized a district court for not properly applying the test. Mairer v. Orr, 754 F.2d 973, 984-5 (Fed. Cir. 1985). Eight circuits have accepted the test. See, "Judicial Review of Constitutional Claims Against the Military," 84 Col.L.Rev. 387(March 1984). The Third Circuit rejected the Mindes test in Dillard v. Brown, 652 F.2d 316

3rd Cir. 1981). Although the D.C. Circuit has cited Mindes favorably, VanderMolen v. Stetson, 571 F.2d 617(D.C. Cir. 1977), the D.C. Circuit has used the more traditional approach that "(i)t is the duty of the federal courts to inquire whether an action of a military agency conforms to the law, or is instead arbitrary, capricious, or contrary to the statutes and regulation governing that agency (citations omitted)." Dilley v. Alexander, 603 F.2d 914, 920(D.C. Cir. 1979).

Petitioner seeks review of the proceedings in much the same way as did the petitioner in this Court's recent decision of Lindahl v. Office of Personnel Management, ___ U.S. ___ 105 S.Ct 1620(1985). In Lindahl this Court found that the Federal Circuit had erred in concluding that judicial review was unavailable "to determine whether 'there has been a substantial departure from important procedural rights, a miscon-struction of the governing legislation,

or some like error going to the heart of the administrative determination.' Scroggins v. United States, 184 Ct.Cl. at 534, 397 F.3d at 297." Lindahl v. OPM, supra, 105 S.Ct. at 1633.

SUMMARY

Granting issuance of a Writ is justified to review the judgement and opinion of the United States Appeals Court for the Federal Circuit based on the adoption of the United States Claims Court decision-judgement granting Respondent (Defendant) summary judgement basis of untimely filing six year statute of limitations without weighing the evidence of fraud, concealment, violation "procedural due process" guaranteed by the UCMJ provisions and states herein, Constitutional Rights, provided by 1st, 4th, 5th, 7th, 8th and 14th Amendments; and, applicable entitlement afforded by Federal Statute, Army Regulations, UCMJ Article 138, 139, and AR 15-6 based on IG accusations of perjury, conduct unbecoming an officer, inventory/equipment shortages, etc. all unproven allegations denied by evidence presented, thereby Petitioner had every reasonable reason to

believe that he was completely ex-honorated and the IG investigation was resolved by higher headquarters in his favor in light of sworn testimony 31 Jan, 7 Feb and 4 Nov 1959.

Records before a Board must be before it properly, verified, and consideration adverse information must be QUALIFIED, AR 640-98. Refer 10 U.S.C. Sec 5706. -- "Government" will refer to federal officials. Fraudulently concealed federal actions against parties maybe tolled according to traditional tolling principles under the Supreme Court holding in Holberg, 327 U.S. at 397; and, Allen v. U.S., 588F. Supp 247 in which the statute of limitations was tolled because government concealment prevented discovery of the injury as a result of government.

CONCLUSIONS

Petitioner prays, for all the foregoing reasons stated, that this Honorable Supreme Court will grant the issuance of a Writ of Certiorari to review the judgement and opinion of the Appeals Court in adopt(ion) of the Claims Court opinion, that decision is based on incomplete record, error of record, posing questions of federal law and constitutionality, in controversies by denial of Petitioner his Constitutional "due process" guaranteed by the Constitution of the U.S. Bill of Rights; and, denial of "Deposition and Discovery" by the Claims Court; and, violation by the Military Department of the Army of the properly appointed superintend(ed) Civilian Authority, i.e., The Sec. of the Army Order of 13 May 1960; Army Regulations, Federal Statutes, and UCMJ.

DATED: 26 March 1987

BY:

IRVIN JAMES HUNTZINGER
Pro Se
18 Tree Haven Lane
STAFFORD, VA 22554-9251
Tel. No.: (703) 752-1060

I

United States Court of Appeals
For the Federal Circuit
171 Madison Place, N.W.
Washington, D.C. 20439

Francis X. Gindhart
Clerk

Tel: 633-6550
Area Code 202

January 8, 1987

Mr. Irvin James Huntzinger
18 Tree Haven Lane
Stafford, VA 22554-9261

Dear Mr. Huntzinger:

Irvin James Huntzinger v. The United States
Appeal No. 86-798

I am enclosing a copy of the order of the court declining your suggestion for rehearing in banc. The requests contained in your letter of December 24, 1986, to file an amendment to your original motion for rehearing in banc and for permission to submit a brief which was to have been submitted by previous counsel have been denied by the court.

In response to the questions that were contained in your letter of December 11, 1986, I am enclosing a copy of the court's rules. You can find the Federal Rules of Appellate Procedure in the reference section of most local libraries.

The request for permission to resubmit records returned by the Clerk of the Claims Court contained in your petition for rehearing in banc has also been denied.

Your motion to publish the court's opinion was denied on December 23, 1986, and it is not necessary for you to resubmit your motion in typed form.

* * * * * * * * *

Very truly yours,

s/t Francis X. Gindhart

Encs.

1. Order declining petition for rehearing in banc.

2. Rules

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

IRVIN JAMES HUNTZINGER, Appellant,	)	
v.	)	Appeal No. 86-798
UNITED STATES, Appellee.	)	

DECIDED: October 20, 1986

Before MARKEY, Chief Judge, NEWMAN and ARCHER, Circuit Judges. ARCHER, Circuit Judge.

Appellant Huntzinger appeals the summary judgment of the United States Claims Court dismissing his complaint. Huntzinger v. United States, 9 Cl. Ct. 90 (1985). Huntzinger's complaint, filed May 28, 1985, challenged his removal from active service in the United States Army in 1960 and sought reinstatement along with back pay and other benefits.

The Claims Court held that Huntzinger's claims were barred by the statute of limitations. Finding no error in that decision, we affirm on the basis of the Claims Court's opinion.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IRVIN JAMES HUNTZINGER, Appellant,	)	RECEIVED NOV 26, 1986 US of Appeals For the Federal Circuit
v.	)	
UNITED STATES, Appellee.	)	Appeal No 86-798

FILED - US COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
DEC. 2, 1986

MOTION
LEAVE OF THE COURT TO
FILE REHEARING IN BANC
(Rule 26 & 27)

Appellant respectfully requests and prays that this Honorable Court grant leave to file delayed petition-motion for REHEARING IN BANC pursuant to Rule 15 due unusual circumstances creative of hardship due to family problems abroad, serving in the Armed Forces, and cession (appeal) agreement-- Counsel-- proceed pro se for rehearing of appeal.

Respectfully request pursuant to Rule 29 the Honorable Chief Judge MARKEY excuses himself under 28 USC 45, as amended, in the proceeding in which his impartiality might be reasonably questioned, as I have been advised, that he is

a former Military JAG Officer. Therefore, may have developed personal bias or prejudice with partiality in favor of the Appelles' Military Department as it effects--RETALITORY ACTION by an Inspector General Investigative Report (ROI) of complaint, which ROI includes JAG opinion(s), and improprity by Appellee, ie., Concealment-Fraudulant action(s) basis vs. Justice. That the Appellee must be held accountable /responsible prescribed action in accord with its published directives; and, further is responsible to properly inform the Soldier of prejudicial material employed in adverse personnel action (s) in accordance with its published Regulations-Policies; violations thereof set side, tolling the Statute of Limitations when intentionally, wrongully, illegally, acted upon in commission of the act of Tort Fraud, when applied to the Soldier, this case, the Appellant, denial thereby of due process.

That this Honorable Court in BANC specifically bring to the attention of the entire Court the precedent-- setting question(s) of "Exceptional Importance" to the United States Soldier(s) in the service of their Country, as effects, VIOLATION of their Right to "Due Process" as guaranteed by the United States Constitution and further stipulated in Appellee's written policies and published directives. Rehearing is based on the record(s) of the Appellee and Appellant as introduced before this Honorable Court, Court of Claims, Army Board for Correction Military Records and Appellant's personnel 201 file.

QUESTIONS TO BE DECIDED;

1. Does a Soldier forfeit his Constitutional Rights of Due Process and entitlement to impartial hearing when accused of prejudicial accusations, with right of cross examination of his accusers'/witnesses, and appeal entitlement as set forth in appellees Army Regulation. Consideration existing

conditions of concealment/fraud v. Statute Limitations, tolling thereof, basis sequestered-classified till discovery 1979 thru declassification, passage by Congress FOI & Privacy Act of 1974.

2. Do the Courts tolerate Appellee's non-compliance with its published directives, act through unfavorable personnel actions effecting the Soldier based upon classified-sequestered records of prejudicial-adverse material without proper notification of the Soldier; and, intentional concealment from Appellant & Congress.

3. Upon discovery of sequestered records not contained within the soldier's 201 personnel records condone fraudulant actions(s); basis of concealment, "Hoodwinking", and the act of Tort Fraud, "Hide" by invocation of the Statute of Limitations; knowing that Appellee by its own written regulation(s) were required to notify Soldier of

prejudicial-adverse matter upon completion of development of such matter (AR 20-1; 640-98), knowing Appellant had no means of discovery.

4. Will the Court grant immunity to the Military Department of the Appellee, through Statute of Limitations, by "concealment" or "sham" through sequestered/classified record, non-compliance with its instruction issued by the Secretaries of the Services to the President of their Boards; and, condone "improprity" by the IG/Army.

5. Consideration of Prejudicial Material and Adverse Matter not qualified under its directives (AR 640-98); and specific instruction issued by the Appellee's Departmental Secretary.

6. Is witholding of most recent service of the Soldier, withheld by the Branch Chief, from the Active Duty Board in consideration of elimination action under Appellee's "Annual Screening Program" AR 135-173 proper or in fact illegal, wrongful concealment and thereby

commissionn act of Tort Fraud tolling the Statute of Limitations. Appellee advised Appellant, and Commander falsely.

7. Is termination of Active Duty Indefinite Agreement, AUS Contract based on unqualified adverse matter/prejudicial material, in violation Appellee's Instruction, policy, and Regulations -- developed by IG employed without hearing or advise of the Soldier, in retalitory action for submission of letter per request of a Senior Commander -- referred for investigation; but, prior to completion the requesting Commander is relieved, subject ROI scope is curtailed, subsequently reviewed by higher authority as contains "NO Prejudicial Material" and record is sequestered. However, prior to subject review -- Appellant (Soldier) is notified through the on-going-investigation by interrogatories that the IG developed prejudicial material casting unfavorable upon his conduct as an officer, perjury, shortage of equipment, etc., to which he responds---accepted by

his immediate local IG without further action, the assumption is proper to assume that the Soldier has been exhonorated, without Administrative /Disciplinary action or action pursuant to the Uniformed Code of Military Justice or Board action (AR-15-6). Under Appellee's Regulation (AR20-1) IG is responsible for notification of Soldier (Appellant) of prejudicial material that affects him personally. In absence thereof, with proper response to interrogatories during the on-going investigation it is only reasonable to assume that the soldier was/is exhonorated completely; again if the record is classified/sequestered there is no way for the soldier (Appellant) to have suspected otherwise, IG improprity.

8. RETALITORY action is PROHIBITED for registering a complaint under Appellee's Regulations (AR 20-1 & IG TB4). In Appellant's case subject complaint was requested by a Superior Officer and initiated in the Commander's

Office as reflected in Sworn Testimony to their Departmental IG, not disputed, by Appellee, BUT, was in fact submitted, without qualification under Appellee's regulation (AR 640-98) for basis of elimination action under provisions of "annual screening" (AR 135-173) with complete disregard use of "adverse matter" not qualified pursuant Appellee's Regulation (AR 135-173) and Letter Instruction to the Army Active Duty Board (AADB) from Secretary of the Army. Per Appellee record AADB states basis Comment 1 ("IG" Recommendation with copy IG-ROI), approval elimination action.

9. Appellant's elimination action upon recommendation of the IG as submitted by his Branch Career Management Chief, contrary to instructions by Secretary of the Army, to the President AADB, further contained false statement(s) regarding duty performance, training, etc., as fact to the AADB illegally, wrongfully, concealing the true facts, of his prior and most recent

performance, coupled with correction of deficiencies in letter of Counsel issued by Provost Marshal General regarding "dual Loyalty" conflict Active Army and Reserve Officer Association. Further withheld Appellant's "Request for Reconsideration Relief from Active Duty" with supporting documents placing his most recent performance in the top 10% of his contemporaries, coupled with strong recommenda- tions of his current/previous Provost Marshal (COL/LTC), MPC Officer(s), immediate Commander(s), Chief of Staff the Infantry Center, Ft. Dix NJ intermediate Commanders and First US Army from the active duty board on their 7 June 1960 reconsideration of- an ER corrected, sustaining their original action, again based on IG ROI elimination action, sequestered from the record not part of the personnel 201 record; with advise to Appellant that denial was based on ER.."duty performance" prior service outstanding pos of CSM.

10. The ABCMR acted arbitrary and capriciously and in error when stating that subject letter, 19 Mar 60, requesting reconsideration retention active duty was considered on 2 April 1960 by the ADB. This comment is based on signed documents within the record of this court and attested to by TAGO under FOIA that no such action is of record.

11. The ADB violated the Secretary of the Army Letter of Instruction, of 13 May 1960, when it considered and acted upon adverse matter NOT qualified under Appellee's Regulation (AR 640-98); and NOT A part of the personnel record "201" file. Thereby Concealment with fraud.

12. The ADB was improperly employed for IG elimination action recommendation, forwarded by Branch Chief, with copy of IG-ROI, upon review by DA-IG was originally found to be biased, prejudiced with forgone conclusions prior to interview of subject (Appellant), subsequently <u>final</u> review "NO PREJUDICIAL MATERIAL"; 3 Aug 60 after discharge on 24

June 1960. Action repeated concealment, illegal, violation Reg's.

13. The ABCMR acted arbitrary and capriciously when they did not act upon original application submitted with letter of 19 March 1960, attached to Letter Requesting Retention, exhausting administrative remedies, a wrongful-illegal action concealed from Appellant.

14. The ADB acted illegally when they accepted recommendation of the Career Branch Chief; failed to verify the records, and acted upon unqualified--concealed, fraudulent information, contrary instruction Secretary Army -- NOT qualified, per AR 135-173 and 640-98 Adverse matter; considered by ADB twice, originally 27 Feb, reconsideration recommendation DA-IG basis correction ER 7 June 1960.

15. Pursuant to Appellee's Directives (AR 20-1) his IG is required to notify Complainant upon <u>completion</u> of his investigation of any prejudicial matter or information which may effect

him. Since, IG-ROI are priviledged information, classified, and sequested within the IG Record System there is no way the Appellant could have gained knowledge unless advised in accord with IG regulation. Without such notification, proper response to interrogatories during the course of investigation it is proper to assume that Appellant was exhonorated; or if allegations were founded Administrative action, or hearing/board action pursuant to Appellee's Regulation (AR 15-6) and/or action pursuant to Uniformed Code of Military Justice governing such allegations prejudicial conduct requiring notification of Appellant, is mandatory.

16. Appeal(s) contained within Sworn Testimony must be accepted, and in fact so stipulated by DA-IG--in absence of further response again it must be assumed, by Appellee's Regulation Appellant was exhonorated based upon his Sworn Response to Interrogatories. (AR 20-1 & DAIG T4).

17. This Honorable Court MUST NOT permit the Appellee to ignore his own written directives/regulations and policies by invoking the Statute of Limitations when the record, unequivocally, repeatedly, reflects concealment, illegal, wrongful action(s), and fraudulent deceiving-by "hoodwinking" Appellant that his elimination was based upon Efficiency Reports--poor duty performance, and so stated upon inquiry to members of US Congress. No reference made to prejudicial IG-ROI on inquiry or in response to unfavorable personnel actions, advise of Adverse material, nor has Appellee shown that Appellant had reasonable knowledge or cause assume DA-IG would participate in illegal action--or, conceivably known his relief was based upon other than the ER(s) received at Fort Hood over a nine month period versus twelve years ten months enlisted service, most recent assignments Staff Sergeant or Command Sergeant Major Positions--2 years 10 months Commissioned.

DISCUSSION

The Army ADB, and ABCMR acted upon "sequestered-classified" record not qualified adverse matter (AR 640-98)--without Appellant's knowledge, containing fraudulent information and they neglected to verify such information presented by Chief Career Branch prior completion, final review by DA-IG; which review commented on the bias, prejudice and apparent opinions of the IG investigating officer prior to interviewing Complainant (Appellant), with foregone conclusions. Final review, after Appellant's separation 24 June 1960, on 3 August 1960 determined contained "no prejudicial material". The ADB acted 7 June on Appellant's request reconsideration basis "ERs" without benefit of his letter dated 19 March 1960 containing his immediate Commander's recommendation for retention, coupled with recommendation of the Provost Marshal(s) (COL & LTC MPC), Chief of Staff Infantry Training Center, Fort Dix and 1st USA, including documents

placing Appellant in top 10% of his contemporaries, and numerous Commendations received past year.

Claims Court held that Appellant's claim is barred by SOL, finding no error of record, this Honorable Court affirmed opinion without comment consideration error of records, missing record, or Appellant's claim of Tort Fraud and concealment basis tolling SOL; further Appellee did not comply with its own published Regulations, violated Appellant's constitutional right of due process, appeal right by directives. IG employed by "sham" based upon illegal IG actions(s). Fact that IG ROI are classified, and sequested, failure comply with AR 640-98 concerning Appellee's qualification of adverse matter there is no way that Appellant could have gained knowledge thereof, as stated by Appellee's Counsel "upon request" Appellant could have obtained copy of IG-ROI findings, recommenations. This is simply a mis-statement of fact applicable in

1960 under provisions of IG Regulation (AR 20-1), IG-ROI are priviledged reports to the Commander classified and sequestered within IG File Records; and maybe only released by the Commander for accomplishment of specific action.

The ABCMR further acted arbitrarily and capriciously when they disregarded the "Chaos" fiasco conditions that took place during subject time frame of ERs in question rendered at Fort Hood, Texas; which detail was so vividly recollected in SWORN TESTIMONY OF the former Provost Marshal General, MG Hayden L. Boatner. In deed, in light of justice, and the ABCMR stated policy it was their responsiblity at that time to verify information and confirm allegations that MG Boatner's memory may have been dulled with time, as per record of Appellee. Appellant's immediate Commander did in recommendation continued active duty, confirming MG Boatner's recommendation "set-aside" ERs Fort Hood, evaluating Appellant based on his prior excellent and subsequent

"outstanding" service with recommendation placement top 10% of his contemporaries with recommendation promotion ahead of his contemporaries in unit vacancy. ABCMR failed correct error/omitted by concealment error of record noted by Appellant, in rebuttal to decision memo.

The Courts must not excuse Appellee's ilegal, intentional "hoodwinking" Appellant through "SHAM" of employing "annual screening" process, AR 135-173 concealment of their action fraudulently, when in fact, knowing, deceived by written communication(s) to Apellant that he was releived based on his ERs; BUT, when in fact action was based on fraudulent information, biased, prejudice IG-ROI; which upon review by Appellee's Department Army IG was commented upon could reflect unfavorably upon the IG System; and all who have participated in the action, on which Lt. Huntzinger must depend for an impartial investigation.... The record clearly records the intentional sequestering of

the record, withholding from Appellant's knowledge by concealment through classification, etc. IG-ROI.

Appellant would have never discovered this injustice had he not gained knowledge in 1979 of the passage of the FOIA of 1966 effective 1 July 1967 and the Privacy Act of 1974 effective 1975. This protection was not afforded military personnel in 1960 and discovery of "sequestered-classified" files of the IG were not available. Discovery in "fishing expeditions" is still prohibited by implementation of FOIA instructions. Further there is NO REASON TO SUSPECT IG OF FRAUDULENT ACTION AND NEGLECT COMPLIANCE WITH ITS DIRECTIVES.

This case is deemed most important in that the basis in "JUSTICE" principle, and fight for the Soldier's right to due process; protection of his constitutional right(s), denied by unethical conduct of appellee's Dept Army through illegal, wrongful, and fraudulent means--"hoodwinking" and concealment by

Appellee's IG whom must be impartial and relied upon for fairness, compliance with Appellee's published regulations, policies, and directives governing actions as referred to herein. IG-ROI are priviledged communication of command.

Certainly, recognizance of taxpayers dollars a consideration; but "justice" -- protection of individual constitutional right(s) and due process far outweigh any dollar value which must decide this case overriding enforcement of Appellee's published policy. Adherence to prescribed rules, regulations by our Government, Appellee's Military Department is sworn to uphold in peace and war, as the Appellant has that oath also. (For the record "off-sets" will reduce monetary amount significantly; and Appellant has advised subject to negotiate willingness of recouping losses, costs and Attorney-Counsel fees.) Punitive damages are the discretion of the Court.

Appellant relies upon the court record for precedent(s), established

rules, statutes of law as presented before the Court of Claims, and this Honorable Court by counsel; and rules, keys, quoted in complaint, as amended, summarized in reconsideration and response thereto in the Claims Court of fact denial of discovery.

Respectfully, request permission to resubmit the records returned by the Clerk of the Claims Court in error as admitted by the Honorable Judge Yock, referred to by Counsel as TAB "A" thru "X", in fact consists of Incl 1 Tab "A" thru "X" and Incl 2 thru 6 with incl(s)-Tabs, fairness in Courts deliberations.

WHEREAS: Appellee is responsible for compliance with their published directives/regulations and policies, to include instruction(s) issued by Service Secretaries to Boards acting in their behalf; and, absence required notification, Appellee is accountable.

WHEREAS: violations by Act of Fraud, Concealment, and "hoodwinking"; knowingly and intentionally-fraudulently

violating the Soldier's (Appellant) due process, illegal set-aside of appeal right, and consitutional guaranteed right(s) to a fair and impartial trial (hearing) further guaranteed under Appellee's regulation (AR 15-6) and Uniformed Code of Military Justice while in the service, violation thereof can not be tolerated by fraudulent action, concealment, when Appellee has a duty-responsibility by its regulation to advise the soldier of that which may affect him personally--adversely, by sequestering through classification; upon discovery hide by invoking the Statute of Limitations. I refuse to believe that this Honorable Court will authorize such action nor is it the intent of the Congress to tolerate such actions, morally/legally right.

THEREFORE: Request respectfully and pray that this Honorable Court reverse the opinion of 20 October 1986; and, in light of fairness and justice exhonorate the Appellant and grant judgement in

favor of the Appellant. Require Appellee to comply with their published regulations, directives, and policies NOT requiring each soldier discharged to initiate litigiation action through the Courts for discovery that his separation was right and proper within Appellee's regulations. The purpose of the Inspector General System is to protect the soldier's rights, discover waste and fraud. Therefore it is imperative that the Courts protest/not tolerate such actions concealed by the Appellee. In the event that this Honorable Court sustains Statute of Limitations, request this case be remanded to the ABCMR directing a formal hearing in light of justice as mandated by the Congress and implemented by AR 15-185. ABCMR auth waive SOL.

DATED: 15 November 1986

BY: IRVIN JAMES HUNTZINGER, Sr.
pro se
18 Tree Haven Lane
Stafford, VA 22554-9251

United States Court of Appeals
for the Federal Circuit

IRVIN JAMES HUNTZINGER	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 86-798
	)	
UNITED STATES,	)	
	)	
Appellee.	)	

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

s/t Francis X Gindhart,
Clerk

1/8/87
Date

cc: Mr. Irvin James Huntzinger, Sr.
18 Tree Haven Lane
Stafford, VA 22554-9261

Mr. John S. Groat, DOJ

United States Court of Appeals
For The Federal Circuit

FILED
By Leave of the Court

IRVIN JAMES HUNTZINGER)
Appellant)
v.) Case No. 86-798
THE UNITED STATES)
Appellee)US.Cl.Ct.No 317-85
9ClCrt90 (1985)

Appeal From The U.S. Claim Court
MOTION
Publication of Opinion
(RULE 23)

Respectfully petition this Honorable Court and hereby move motion pursuant Rule 23, PHB, for publication of UNPRECEDENTED OPINION dated 20 October 1985 and subsequent actions(s), orders pertinent hereto be issued by this Honorable Court for the following reasons (justification), coupled with "Rehearing in Banc":

1. The ABCMR acting arbitrary and capriciously may deny a petition without verification of the merit facts, presented by opinion, of appellee's agent(s); and the U.S. Claims Court has "established precedent value" to affect

that members of the Armed Forces (DOD-Army) in denial of, without verification, evaluating the merit(s)/law of the case -- versus--"TOLLING" statute of limitations "light of justice" by sustaining the commission(s) of illegal, wrongful and fraudulent actions by the Army in condoning "CONCEALMENT" of their actions and "HOODWINKING" of the soldier, Victim, appellant, of adverse prejudicial promotion, "elimination" action(s) in violation of Army published regulation(s) and by sustaining such action(s) by the ABCMR is denial of due process and NOT JUSTICE and:

2. The ABCMR examiner states that appellant's letter of 19 March 1960 requesting retention active duty (USA) with his immediate and major commanders strong recommendation of approval, etc. was considered by the ADB on 2 April 1960, "is in 'error' stated", conflict with previous examiner's report/record-- that appelant's case was twice (originally) reviewed on 28 February 1960

by the ADB and reconsidered second time on 7 June 1960; (separated 24 June 1960) upon recommendation DA-TIGO in response to Huntzinger's complaint to DA-TIG regarding "ERs" prepared/submitted improperly by a rating officer NOT his immediate supervisor during a subject period of rating time and improper command channels for improper reason and not due. By DA-IG investigation ER reported resolved in favor of Huntzinger, BUT record was corrected improperly, NOT in accord with complaint or as per letter received AFTER separation. FACT: ADB did not review his letter of 19 March 1960 is further documented by the Chief, Personnel OPMG-CMD, DA, per record stated "Huntzinger letter held in abeyance pending decision ER action." VERIFICATION confirmed by TAG-DA and USA RCP&AC, AGDA custodian of records to include Huntzinger's 201 personnel records that "There is no document of record ADB action 2 April 1960 pertaining to his letter of 19 March 1960." Further

evidence is obvious by absence of action requested by ABCMR or requested "Show Cause Board" per letter 19 March 1960 and all ADB documents by number and dated comments are accounted for in sequestered record. Copies furnished ABCMR & US Ct. Cl., obtained by "fishing expedition" provision FOIA and Privacy Act dtd 1 July 1975 and received from TAGO or GSA Archives in 1979-81 time frame as discussed with ABCMR examiner with reference to past and pending applications set aside of Ft. Hood OERs. When the examiner stated it appeared "illegal, wrongful, fraudulent" separation action may exist (memo of record available) violations of Army regulations and it was agreed return pending application "without prejudice" for consultation with attorney and resubmission with newly discovered documents in June 1979.

3. The U.S. Court of Appeals for the Federal Circuit, in UNPUBLISHED opinion dated 20 October 1986 stated:

"The Claims Court held Huntzinger's claims were barred by the Statute of Limitations. Finding no error in that decision, we affirm on the claim's court opinion." (Underlining added)

This Honorable Court acted without comment of fraudulent, illegal, wrongful action(s) componded error of record, violation of appellee's regulation(s) and stated policy directives making it mandatory for each soldier, upon separation to file litigation, protection his due process rights; and permits the military departments permissiveness violate their written regulations, disregarding the soldiers (Appellant) right to assumption that the Army must properly perform their responsiblities in compliance of personnel action policy--must comply, therewith, and protect soldier's individual constitutional rights, further protection guaranteed by

Army policy directives, Uniform Code of Military Justice, and published regulations governing personnel actions, i.e. separation and promotion and ER's, etc., and that they (Appellee) further may conceal illegal, wrongful, and fraudulent adverse matters prejudicial to the individual soldier (appellant), which affects his honorable status and active duty contractual agreement and future favorable personnel actions as provide within appellee's regulations, although, such regulations mandatorily require appellee's Army policy to notify the soldier (Appellant) of adverse matters - prejudicial - which may adversely affect future personnel action(s).

THIS CHANGE IN POLICY IS OF WIDESPREAD MILITARY-JAG and GENERAL LEGAL INTEREST. Precedent "IG" policy.

Previous legal doctrine accepted tolling of (six year) statute of limitations until discovery, or when concealment, a fraud tort act or illegal, wrongful act existed and that the government is charged with responsiblity for its act and are accepted in good faith as such.

Therefore, Appellant accepted his separation in good faith, as per record, recorded on separation document "Annual Screening" AR 135-173, and, per advice of commanders, Dept of Army TAG, TIG and ABCMR that his only recourse to return to active duty was through ABCMR to set-aside Ft. Hood ERs. Excess "100" personnel actions including promotion unit vacancy and mandatory pass over with congressional inquiries, appellee did not inform/advise of adverse IG-ROI, nor, was there reason for suspect or litigation based on ER's at time of separation or there after based on 201 personnel records.

However, this Honorable Court in its

opinion has further acknowledged the employment of "hidden classified/sequestered/privileged communications of the Commander" i.e. IG-ROI containing adverse prejudicial information without advising or knowledge of complainant (soldier) appellant in accordance with its published regulations and specifically places the "burden of discovery" upon the soldier at the time of separation. A shifting of past policy procedure without known cause.

The Court further conceeds employment of adverse, without verification, matter "not qualified" as required in accordance with appellee's regulation (AR 640-98) in annual screening of personnel 201 records for elimination action pursuant to AR 135-173 and prescribed annual policy instruction of the Secretary of the Army to the President of the ADB. Direct conflict case of Biddle v. U.S., ADB action 8 June 1960 decided 1969. Six year SOL not applied. (*Petitioner's case considered 7 Jun 1960.)

APX P-035

*MFR: Added for comparison ADB/ABCMR inconsistency.

Pursuant to this Honorable Court's opinion of 20 October 1986 placing burden on soldier at time of separation--to protect future rights and benefits would require automatic filing of litigation under annual screening category. Initiate discovery procedure (routinely) under these circumstances would create/promote "fishing expeditions" currently prohibited pursuant to appellee's regulation (AR 340-17) implementing FOI and Privacy Act(s), and, due to expenses of litigation attorney fee's promote the necessity of "pro se" actions "without probable cause."

In view of the impact placed on this case by the ABCMR, U.S. Court of Claims and this Honorable Appeals Court in protection of the soldier's constitutional rights and due process this opinion with the pending "rehearing in banc" be given the widest dissemination to members of the Armed Forces with emphasis "military justice."

No longer may it be assumed or accepted practice that illegal, wrongful acts concealed by the Army be basis for tolling statute of limitations, upon discovery after six year of separation that the fact - act of tort fraud existed"--- "fixing date of separation" as effective date tolling statute of limitations, unless reversed by "rehearing in banc" by this Honorable Court.

Respectfully submitted, request this motion, supplement, with concurrent consideration, motion "rehearing in banc" filed December 2, 1986.

Dated: 11 December 1986

By: Irvin James Huntzinger
Appellant, pro se
18 Tree Haven Lane
Stafford, VA 22554-9251

II

In the United States Claims Court

FILED
Oct 23, 1985
U.S. Claims Court

No. 317-85C

IRVIN JAMES HUNTZINGER) Military Pay; statute of limitation; 28 USC $2501 (1982); accrual of action; reinstatement to active duty; correction of records; disability retirement

v.

THE UNITED STATES

Irvin James Huntzinger, Stafford, VA, pro se

Elaine J. Guth, Washington, D.C., with whom was Acting Assistant Attorney General Richard K. Willard, for defendant.

OPINION

YOCK, Judge:

In this military pay case, the plaintiff, Irvin James Huntzinger, a former Army officer, instituted an action pro se seeking retroactive reinstatement to active duty at the grade of first lieutenant effective June 24, 1960, constructive promotion to the grade of colonel effective July 3, 1981, and recovery of all back pay, allowances and

benefits that would flow therefrom. Plaintiff also requests the correction of certain of his Officer Efficiency Reports (OER's in his Army record and seeks to set aside his 1970 disability retirement. Plaintiff further requests recovery of attorney's fees and costs associated with his claims as well as punitive damages as the Court deems appropriate.

The case is before the Court on the defendant's motion to dismiss, or in the alternative, motion for summary judgment. For the reasons discussed herein, the defendant's motion for summary judgment is granted, and the case is to be dismissed. RUSCC 12 (b). The material facts are not in dispute.

Facts

Mr. Irvin Huntzinger enlisted in the U. S. Army Air Corps at age 14 on August 29, 1946 using his brother's draft card. He was honorably discharged from enlisted service in the Army on January 25, 1957, and on January 26, 1957, he entered active duty as a second lieutenant, U. S.

Army Reserve. Mr. Huntzinger's first officer asignment was Fort Sill, Oklahoma, where he transferred to the Military Police Corps. In January 1958, Mr. Huntzinger was assigned as a platoon leader in the Marshall Islands but was relieved after two months and given an unfavorable OER. Following his relief, Lieutenant Huntzinger was reassigned to Fort Hood, Texas. While at Fort Hood, Mr. Huntzinger received two other OER's indicating that as a lieutenant he had reached his maximum potential and grade.

In early 1959, Lt. Huntzinger was given orders for assignment to Okinawa. About the same time, plaintiff wrote a 15-page letter (dated January 24, 1959) to the Secretary of the Army, via the commanding general of Fort Hood, Texas, alleging, among other things, that he had been mistreated while at Fort Hood. On February 6, 1959, following receipt of the letter, the commanding general at Fort Hood ordered the inspector general to conduct an investigation into

plaintiff's allegations. In addition, Lt. Huntzingers's assignment orders to Okinawa were revoked and he was assigned to Fort Dix, New Jersey, while his allegations were investigated.

During the course of the investigation, the investigating officer uncovered information that contradicted statements made by the plaintiff in his letter to the Secretary, and which were deemed to be prejudicial to plaintiff's character, standing, or efficiency. In view of this information, the plaintiff was given an eight-page letter dated September 11, 1959, detailing his shortcomings, as required by Army regulations, and allowed to comment and rebut the matters contained therein. On October 7, 1959, the plaintiff acknowledged recieving the September 11, 1959 letter and on November 4, 1959, executed a sworn statement in rebuttal to the letter.

On November 18, 1959, the investigating officer completed his

report and forwarded it to the commanding general at Fort Hood. The investigating officer's report concluded that the plaintiff's allegations were largely false and malicious, that he was not qualified mentally or morally to be an officer of the Army in any capacity, and that he was not capable of developing the qualities and qualifications required of an officer of the Army. The report, therefore, recommended that the Army revoke the plaintiff's commission and eliminate him from the service. On November 19, 1959, the commanding general at Fort Hood approved the conclusions and recommendations of the investigating officer's report.

On February 15, 1960, the Army provost marshal general (Lieutenant Huntzinger's branch chief) recommended that the Department of the Army Active Duty Board (DAADB) consider the plaintiff's elimination. The DAADB considered several substandard OER's and the November 18, 1959, inspector

general's report that contained the recommendation for the applicant's elimination. On March 2, 1960, the DAADB notified the plaintiff of his proposed elimination. On March 19, 1960, the plaintiff filed a letter, seeking reconsideration, with six endorsements from his chain of command, and an application for correction of military records requesting substitution of a favorable OER for the period April 18 to September 15, 1959, for the original OER for that period. The plaintiff based his request upon alleged irregularities in the rating chain continued in the original OER. He requested retention on active duty while his request was considered. Since he had not exhausted his administrative remedies, (*) the application was considered by the Army Board for Correction of Military Records (ABCMR) as a request for appropriate administrative action, and thus forwarded the request to Headquarters, Department of the Army HQDA) for resolution. Mr.

Huntzinger's March 19, 1960 letter caused the DAADB to reconsider its original recommendation. After fully reviewing the evidence before it, the DAADB, on April 2, 1960, reaffirmed its original recommendaion that Mr. Huntzinger be released from active duty.(*)

On March 29, 1960, Mr. Huntzinger submitted a complaint to the Department of the Army Inspector General concerning his 1959 OER. Headquarters personnel reviewed his complaint and records and replaced the OER in dispute with a favorable OER. Because of this action, Lieutenant Huntzinger was notified that the DAADB would again reconsider its recommendation to release him from active duty. On June 7, 1960, the DAADB reconsidered plaintiff's corrected records and his March 19, 1960 letter, and again reaffirmed its recommendation that Mr. Huntzinger be released.

Plaintiff was thereafter released from active duty on June 24, 1960.

On December 4, 1962, following his release from active duty, Mr. Huntzinger was promoted to the grade of captain in the Army Reserves. On September 5, 1968, he returned to active duty for a 296-day limited active duty tour. During this limited duty tour, plaintiff was found, after a complete medical examination was performed, to be medically unfit for further active duty service due to a heart condtion. The examining physician referred the plaintiff to a medical board, which in turn recommended that plaintiff be evaluated by a Physical Evaluation Board (PEB) to determine his continued fitness for active duty. On October 2, 1969, a PEB found the plaintiff medically unfit for further active duty service and recommended a 20 percent disability rating. Upon the plaintiff's rebuttal and reevaluation thereof, the PEB recommended disability retirement of 30 percent disability. On May 5, 1970, the Army Physical Review Council (PRC) reversed the PEB's

MFR added by Petitioner as error of record.
(*Heart condition denied,Hq DA. PEB rec'd con't AD.)

determination that plaintiff was 30 percent disabled, and found that he was 20 percent disabled which entitled the plaintiff to severance pay from the service instead of disability retirement. The PRC concluded that the plaintiff's hypertension did not commence while on active duty service. Upon appeal and reevaluation by the Army Physical Disability Appeal Board (APDAB), the APDAB on August 13, 1970, reversed the PRC and found the PEB's findings and recommendations of 30 percent disability to be correct in law and fact in plaintiff's case. Thus on October 1, 1970, the Army released the plaintiff from active duty and placed him on disability retirement at a 30 percent disability rating.

In December of 1969, prior to his disability retirement, Mr. Huntzinger had been recommended for promotion to the rank of major in the Reserves, effective July 12, 1970. However, the Department of the Army revoked the recommendation for

promotion after finding that Mr. Huntzinger had been found physically disqualified for retention on the active duty roster prior to promotion to major and that, pursuant to Army regulations, Mr. Huntzinger could not properly be promoted to a higher Reserve rank since he failed to meet the standards of medical fitness for promotion in the Reserves. Following his disability retirement from the Army, Mr. Huntzinger worked as a federal civil service employee until he retired from that job due to physical disability.

In January of 1969, while Mr. Huntzinger was serving in his limited active duty tour, he applied to the ABCMR to have three OER's removed from his personnel file. The ABCMR reviewed his records and denied his application on June 11, 1969. Again, on November 12, 1970, Mr. Huntzinger applied to the ABCMR, asking for promotion to the rank of major, USAR, effective July 12, 1970. The board, after considering his

application and record, transferred Mr. Huntzinger to the Retired Reserve in the grade of Major, without entitlement to retired pay in this higher grade, pursuant to 10 U.S.C. $ 1371 (1982). In July 1979, Mr. Huntzinger again petitioned the ABCMR for reconsideration of his 1969 and 1970 applications. The ABCMR denied this request on May 28, 1980. Then, in December 1981, Mr. Huntzinger again requested reconsideration of his 1969 application. The ABCMR denied this request on July 21, 1982.

In 1983 and 1985, Mr. Huntzinger applied to the ABCMR yet again, challenging his 1960 release and requesting promotion to colonel and punitive damages. The ABCMR denied his most recent request on February 27, 1985, noting that it was untimely since Mr. Huntzinger discovered the alleged error or injustice, about which he complained, in 1960 and since passage of 25 years made the relief he requested impractical.

On May 28, 1985, plaintiff filed a claim in this Court under the Tucker Act, 28 U.S.C. $ 1491 (1982) seeking (1) retroactive reinstatement to active duty at the grade of first lieutenant effective June 24, 1960; (2) constructive promotion to the grade of colonel effective July 3, 1981; (3) recovery of all back pay, allowances, accumulated benefits and entitlements since June 24, 1960; (4) correction of 1958-1959 OER's; (5) a setting aside of his 1970 disability retirement; and (6) punitive damages.

Defendant has now moved for summary judgment.

Discussion

In support of its motion for summary judgment, the defendant asserts that all of the plaintiff's claims are barred by the Court's six-year statute of limitations contained in 28 U.S.C. $ 2501 (1982). In addition to the statute of limitations bar, the Government also asserts laches and other affirmative

defenses that would preclude the plaintiff from recovering in this action. Since the Court agrees with the Government's statutory bar argument, this Court will limit discussion to that issue.

A. 1960 Release From Active Duty

Plaintiff's complaint filed May 28, 1985, nearly 25 years after his involuntary relief from active acuty on June 24, 1960, is untimely.[1] The statute of limitations, 28 U.S.C> $ 2501, bars every claim of which this Court has jurisdiction unless the complaint if filed within six years after such claim first accrues. This Court is a court of limited jurisdiction and Congress has not consented to suits against the United

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1 The plaintiff's claims concern events on two separate dates, his involuntary discharrge from active duty on June 24, 1960, and his subsequent physical disability retirement from the Army Reserves on October 1, 1970. Section A of this opinion discusses the plaintiff's release from active duty in 1960, and Section B discusses the plaintiff's contentions in regard to his disability retirement in 1970.

States in this Court if the claim is not filed within the time limited by statute. Soriano v United States, 352 U.S. 270, 273-74 (1957); Kirby v. United States, 201 Ct. C1. 527, 531 (1973, cert. denied, 417 U.S. 919 (1974); Gerber v. United States, 2 Cl Ct. 311, 315 (1983). A claim first "accrues" when all events have occurred which affect the alleged liability of the United States and entitles the claimant to institute an action. Kirby v. United States, supra, 201 Ct. C1. at 532; Japanese War Notes Claimants Ass'n of Philippines, Inc. v. United States, 178 Ct. C1. 630, 632, 373 F.2d 356, 358, cert. denied, 389 U.S. 971 (1967), reh'g denied, 390 U.S. 975 (1968). It is well established that a cause of action for back pay and allowances based on an alleged unlawful military discharge first accrues, and accrues all at once, on the date of discharge. Bonen v. United States, 229 Ct. C1. 144, 148, 666 F.2nd 536, 539, cert. denied, 456 U.S. 991 (1981); Eurell

v. United States, 215 Ct. Cl. 273, 276, 566 F.2d 1146, 1148 (1977; Kirby v. United States, supra, 201 Ct. Cl. at 531; Mathis v. United States, 183 Ct. Cl. 145, 391 F.2d 938 (1968), aff'd on reh'g, 190 Ct. Cl. 925, 421 F.2d 703 (1970); Willcox v. United States, 3 Cl. Ct. 83, 84 (1983), aff'd, 769 F.2d 743 (Fed. Cir. 1985); Monnigh v. United States, 1 Cl. Ct. 427, 428 (1983). In this case, the plaintiff's claim based on his involuntary release from active duty accrued on the date of his discharge, June 24, 1960.

It is clear that plaintiff's discharge-related claims accrued far earlier than six years prior to his filing of a complaint in this Court. Therefore, under the normal application of 28 U.S.C. $ 2501, these claims must be dismissed. Plaintiff, however, counters defendant's assertion that the claims relating to his 1960 release are barred by the statute of limitations by arguing that two special factual circumstances

here toll the statute. These circumstances are first, plaintiff's continual pursuit over a twenty-five year period of his administrative remedies through petition to the ABCMR, and second, the alleged concealment by defendant of material information, bearing upon his 1960 discharge, only recently uncovered by the plaintiff through research pursuant to the Freedom of Information Act. Neither of these circumstances, however, tolls the statute, and all of the plaintiff's claims relating to his 1960 release from active duty must, therefore, be dismissed.

The statute of limitations is not tolled by plaintiff's various petitions to the ABCMR. The Court of Claims has long held that resort to permissive administrative procedures such as a petition to a corrections board does not toll the statute. Bonen v. United States, supra, 229 Ct. Cl. at 148, 666 F.2d at 539; Bruno v. United States, 214 Ct. Cl. 383, 386, 556 F.2d 1104, 1106 (1977);

Eurell v. United States, supra, 215 Ct. Cl. at 276, 566 F.2d at 1148.

Plaintiff's argument that the Government withheld vital information from him at the time of his 1960 release from active duty likewise does not toll the statute. Plaintiff's argument is bottomed on the fact that he never did see a copy of the November 18, 1959 inspector general's report that recommended his elimination from the service, prior to his release from active duty in 1960. Plaintiff also alleges that the Army concealed from him the fact that the DAADB considered the inspector general's report in determining whether the plaintiff should be discharged. Plaintiff claims he first saw a copy of the report in 1979 after he filed a Freedom of Information Act request for all his records.

In certain limited circumstances "the running of the statute will be suspended when an accrual date has been ascertained, but plaintiff does not know

of his claim * * *." Monnigh v. United States, supra, 1 Cl. Ct. at 429; Braude v. United States, 218 Ct. Cl. 270, 273-74, 585 F.2d 1049, 1051-52 (1978); Japanese War Notes Claimants Ass'n v. United States, supra, 178 Ct. Cl. at 634, 373 F.2d at 358-59.

A plaintiff's ignorance as to the existence of a claim of which he should be aware is, however, in itself far from enough to extend the statutory period. As a prerequisite to obtaining any such relief, "plaintiff must show either that defendant has concealed its acts with the result that plaintiff was unaware of the existence of a cause of action or that the nature of plaintiff's injury was such that it was inherently unknowable at the time the cause of action accrued." Willcox v. United States, supra, 3 Cl. Ct. at 85.

In order to successfully toll the statute of limitations under a concealment theory, courts have requirred plaintiffs to plead affirmatively and to

show deceptive or fraudulent concealment that induces justifiable reliance and delay in bringing an action. See Ocean S.S. Co. v. United States, 218 Ct. Cl. 87, 586 F. 2d 774 (1978). The plaintiff has failed to adequately show such concealment.

The administrative record shows that after commencing an investigation arising from plaintiff's allegations of mistreatment at Fort Hood, the inspector general sent plaintiff an eight-page notification letter on September 11, 1959. This notification letter provided in part:

> 1. The undersigned has been directed to conduct an investigation into the allegations made by you in your letter dated 24 January 1959, through Headquarters, Fort Hood, to the Secretary of the Army.
>
> 2. During the conduct of this investigation considerable material was developed in the form of testimony or documentary evidence which contradicted some of the

statements made in your letter, or which are prejudical to your character, standing or efficiency.

3. Paragraph 38, AR 20-1 requires that when evidence prejudicial to the character, standing, or efficiency of any person under the jurisdiction of the Department of the Army is developed during the course of an investigation, an inspector general will, before completing the investigation, orally or in writing make known to the person concerned the exact nature of such prejudicial material. In compliance with this regulation the following material is submitted.

(Extract of Paragraph 38, AR 20-1 is attached (Incl 1) for your information and guidance.)

* * * *

5. An extract of paragraph 16, TB IG 4, which elaborates on paragraph 38, AR 20-1 is attached

as Incl 2. This paragraph requires that I ask you if you desire to submit any further statements or other evidence as contemplated by paragraph 38, AR 20-1. Further, I am required to ask if you desire other witnesses to be called in your behalf. It is requested that you read and throughly understand the referenced paragraphs, as well as Article 31 of the Uniform Code of Military Justice. If you have any question as to the intent or meaning thereof, it is recommended you request advice or assistance from the Inspector General or Staff Judge Advocate of the station to which you are assigned or from the office through which you receive this communication.

Plaintiff acknowledged that he received this notification letter on or about October 7, 1959, and subsequently

submitted a signed, written affidavit dated November 4, 1979, to the investigating officer. The letter placed the plaintiff on specific notice that the investigation contained information adverse to him, and advised him in great detail of his deficiencies.

In addition to the September 11, 1959 letter, the plaintiff, of course, was well aware of his past several OER's that were either unsatisfactory or marginally satisfactory.

With all of this in mind, it strains credulity to accept plaintiff's assertion that the Army concealed vital information from him, such that he did not know that he had a claim, when discharged from active duty on June 24, 1960. While the plaintiff may not have seen the investigative report itself, he certainly was aware of the basic matters contained in that investigation. In short, he knew why his records were being reviewed by the DAADB.

It is clear from the record that the Army did not conceal any critical facts that would keep the plaintiff from knowing that he had a claim against the Army on June 24, 1960, the date of his discharge from active duty. Plaintiff was aware at the time of his discharge of the reasons whey he was discharged. This information was more than adequate to make plaintiff aware of his cause of action within the six-year statute of limitations period. It goes without saying, of course, that once a lawsuit is filed, the parties have the right of discovery, and any hitherto unknown relevant matters must be and would be released. See RUSCC 26-37.

Under these facts, the plaintiff had until June 24, 1966, to file his cause of action in this or its predecessor court. Since the plaintiff did not so file, this Court is now barred by its six-year statute of limitations from considering the plaintiff's claim for reinstatement to active duty.

B. 1970 Disability Retirement

The plaintiff's complaint filed on May 28, 1985, also requests relief from his disability retirement awarded to the plaintiff on October 1, 1970. Although Paragraph 14 of the complaint specifically requests that his disability retirement be "set aside," it is clear from the context of the complaint, as well as the plaintiff's response to the defendant's motion for summary judgment, that he only wants such relief if the Court were willing to void his 1960 discharge and place the plaintiff back on active duty. Conversely, he does not want his disability retirement pay tampered with if the Court denies his request for reinstatement. It is also clear, of course, that one cannot be serving on active duty at the same time that one is drawing disability retirement pay. In any event, the plaintiff is saved from the conflict inherent in his complaint for the same reason that his active duty reinstatement request fails. In other

words, the six-year statute of limitations bars this Court from considering the plaintiff's disability retirement request on the merits. The plaintiff's disability retirement claim accrued on October 1, 1970, the date the plaintiff was retired on disability pursuant to action of the Army Physical Disability Appeal Board, which was a retirement board competent to pass on plaintiff's eligibility for disability retirement. Friedman v. United States, 159 Ct. Cl. 1, 13, 310 F.2d 381, 389-90 (1962), cert. denied sub nom. Lipp v. United States, 373 U.S. 932 (1963). See also Gerber v. United States, supra, 2 Cl. Ct. at 317. Thus, in order for this Court to have jurisdiction over the plaintiff's disability retirement claim, the plaintiff must have filed his claim before October 1, 1976. Not having done so, the Court is without jurisdiction to consider the plaintiff's disability retirement claim on the merits.

CONCLUSION

For the reasons discussed above, the defendant's motion for summary judgment is granted, and the plaintiff's complaint is to be dismissed.

In the United States Claims Court

FILED
Oct 23, 1985
U.S.CLAIMS COURT

No. 317-85-C

IRVIN JAMES HUNTZINGER

JUDGMENT

v.

THE UNITED STATES

Pursuant to the opinion of October 23, 1985, it was held that plaintiff is not entitled to recover with the complaint to be dismissed.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

s/t Frank T. Peartree

Clerk of Court

October 23, 1985 By: Debra L. Samler
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a).

IN THE UNITED STATES CLAIMS COURT

FILED
NOV 4, 1985
U.S. Claims Court

IRVIN JAMES HUNTZINGER,

Plaintiff,

v.

THE UNITED STATES,

Defendant

Case No. 317-85C

MOTION FOR LEAVE
TO
FILE REQUEST FOR RECONSIDERATION

1. Under Rule 83.2(d) respectfully request this Honorable Court grant leave to file this request for "Reconsideration of Orders" pursuant to Rule 83.2(f), USCC.

2. Plaintiff prays that this Honorable Court will grant requested reconsideration of Court Order dismissing and granting summary judgement to Defendant based on facts of law quoted in Inclosure 1, attached, in their liberations concerning the following of Statute Limitations. Specific attention is invited to points of discussion, para 11f, g, i, and conclusions para 15 as pertain to USCC ruling(s), and Military

Keys, applicable Statute(s) with particular attention to BIDDLE, Janunta F v. U.S., USCC 186 (1968-69) KA 125 U 58 v. 186; and RICKER US CtCl 1968; and Gallaway v. Stetson 448 Sup 575.

3. The ABCMR arbritary and capriciously disallowed Plaintiff's claim which originally submitted timely on 19 March 1960 with letter exhausting all administrative remedies; however, Defendant withheld referral of request from the ABCMR, per request contained in basic letter exhausting administrative remedies found in Defendant's APP-1, page 157-158 Par 5 & 6. The Defendant would like for the Court to believe that the complaint was administratively resolved in Plaintiff's favor and therefore, no action was required on Plaintiff's Application to ABCMR, but the record records just the opposite, as submitted by Defendant, i.e. Rating officer was not disqualified per complaint, but merely the ER submitted illegally, was submitted through proper channels and indorsing officer.

Therefore, action by DA-TIGO as confirmed per letter, TAB "R" was not corrected as per letter DA-OTIG, dtd 27 Jun 1960; and, facts were fraudently mispresented to Plaintiff thereby prohibiting him from appeal or taking proper litigation action, further con- firmed by enclosed MEMO FOR RECORD (MFR) to TAB "R".

4. The ABCMR acted arbritary and capricious by not reviewing the complete record, to include the Ft. Hood IG report; and, thereby not verifying all evidence of record of the facts in the case..DAYLEY v. US 169 Ct. Cl. and BIDDLE v. US 186 Ct Cl.; and,

5. The Army further violated its procedure, which conflicts in their "coverup" as recorded on OTIG FORM No. 8 stating "NO PREJUDICIAL DATA" on review; subject review (TAB "S") <u>denied</u> per letter DA, OTIG dtd 13 Sep 1979, that DA-TIGO <u>did</u> in fact review subject ROI, TAB T.; and,

6. MFR dtd 17 August 1959 further supports Plaintiff's argument that

Defendant withheld and concealed by classification subject contents of Ft Hood IG-ROI(s) conclusion(s) and recommendation of removal action by elimination from AD-AUS TAB "U".; and,

7. Defendant's records continually record that Plaintiff was relieved under "annual screening" based upon Satisfactory ERs received at Fort Hood. See Defendant's APP1. Further, the ABCMR, and/or TIGO did not advise Plaintiff that the ROI was found to "substantiate: previously alleged "prejudicial material" after Plaintiff had submitted his rebuttal at Fort Dix under Sworn Testimony with appeal, not action, therefore, again assumed that the entire matter was resolved in Plaintiff's favor; and with assurance that the ERs received at Fort Hood were the cause of his relief under AR 135-173, "annual screening" there was no cause for litigation at that time, since Plaintiff had no knowledge, to the CONTRARY.

8. Cause for litigation was evident

ONLY after discovery that the Army fraudulently submitted data to ADB per DF 15 Feb 1960 with the knowledge of Plaintiff, discovery made June 1979, coupled with IG ROI, pursuant FOIA.

9. Plaintiff had no way of knowing that Defendant had acted fraudulently, and wrongfully by withholding pertinent facts concerning his relief from AD; and, Defendant was CONTINUALLY questioned concerning the relief of AD, per his (APP1, page 157) Plaintiff's Request for Retention on AD --- followed by many subsequent inquiries of record, in Defendant's File(s) pertaining to Plaintiff--thereby wrongfully, illegally, and fraudulently conspiring in Plaintiff's elimination from the service of his Country, under "SHAM" of annual screening, thereby tolling the Statute of Limitations RICKER v. US Ct Cl 1968., WITHOUT knowledge of Plaintiff, and by means only available to the Defendant, knowingly, prevented Plaintiff from discovery; thereby, the claim first

"accrued" upon discovery by Plaintiff, or, when he should have had knowledge. Kirby v US supra, 201 Ct. Cl at 532. Bonen v. US 229 Ct. Cl. 144, 148, 666 F 2d 536, 539,; Willcox v. US, 3 Cl.Ct. 83,84 (1983), aff'd 769 F. 2d 743 (Fed Cir. 1985). There was no way that Plaintiff could have known of the fraudulent, wrongful relief of active duty, or had the least suspicion that the Departmental Army Inspector General or Provost Marshal General would commit conspiracy--frauduently, through a "SHAM" initiate elimination action under disguise of "ANNUAL SCREENING". Plaintiff DID NOT have access to the SOP, Directives, or information withheld intentionally by Defendant, or covered up IG-ROI subsequently recorded "NO PREJUDICIAL MATERIAL" by Defendant in violation of Constitutional Due Process, and thereby Plaintiff was not aware of his claim, until discovery June 1979, which in effect would start the running of the Statutue of Limitations. Monnigh

v. US, supra, 1 Ct Cl 429; Braude v. US, 218 Ct Cl. 270, 273-74, 585 F.2d 1049, 1051-52 (1978); and, Willcox v. US Supra 3 Cl. Ct. at 85..; and,

10. Defendant is required by its own directive to advise Complainant upon completion of investigation by the IG advising applicable prejudicial matter. This was not accomplished in this case, thereby, Plaintiff had every right to assume by Defendant's own Regulations and due process, coupled with appeal rights if in deed prejudicial material was upheld by Defendant's approval that he could reasonable assume the Ft Hood IG ROI was not substaintiated, and specifically the time element involved. Plaintiff was served documents of alleged prejudical material in October 1959 and responded thereto, with appeal of jurisdication of the Ft. Hood IG to a higher headquarters to which NO RESPONSE WAS RECEIVED, again Plaintiff could only reasonable assume that the alleged charges of prejudicial material was

dismissed by higher headquarters. Plaintiff is of the opinion that Defendant's action in concealment is supported by Ocean S.S. Co. v. US, 218 Ct. Cl. 87, 586 F 2d 774 (1978).

11. The administrative record is in conflict with the facts. The Plaintiff did not complain of mistreatment, after submission of rebuttal to ER's (prepared by civilian Counsel) he was requested by his Senior Commander to submit a detailed report from his diaries of the conditions he experienced from date of assignment to Fort Hood, to include TDY to classified assignment, until receipt of permanent change of station orders. This was accomplished, per request Deputy of the Commanding General, MG William S. Biddle, both subsequently relieved. Details contained in TAB "O" letters prepared by Counsel to ABCMR, and contained within Defendant's APP1.

Dated: 31 October 1985

By: IRVIN JAMES HUNTZINGER, Plaintiff
Major, U.S. Army Retired
Attorney, Pro se.

CERTIFICATE OF SERVICE

I certify that I have this 1st day of November deposited in the United States Mail 2 copies of this document with TAB(s) through "U"; less Incl 1, previously furnished Defendent, addressed to: I.J. HUNTZINGER

Ms. Elaine J. Guth, Esquire
Attorney, Commercial Litigation Br.
Civil Division - JUSTICE DEPARTMENT

In The United States Claims Court

FILED
Dec 17, 1985
U.S. Claims Court

IRVIN JAMES HUNTZINGER	)	
	)	
v.	)	No. 317-85C
	)	
THE UNITED STATES	)	

RECONSIDERATION ORDER

In his Motion for Reconsideration, the plaintiff has provided no additional evidence or arguments not previously considered in the Court's original decision of October 23, 1985. Consequently, plaintiff's Motion for Reconsideration filed November 4, 1985 is hereby denied.

IT IS SO ORDERED.

s/t Robert J. Yock
Judge

III

IN THE UNITED STATES CLAIMS COURT

FILED
NOV 29, 1985
US. CLAIMS COURT

IRVIN JAMES HUNTZINGER,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

CASE NO: 317-85C

PLAINTIFF'S RESPONSE
TO
DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION FOR RECONSIDERATION
and,
MOTION FOR LEAVE OF COURT
(Rule 83.1 and 83.1(b) (4))

ALLOWED
Dec 10 1985

1. Under Rule 83.1 request leave to file excess of 10 pages due to the voluminous nature of the case, Defendant's questions imposed upon documentation furnished by Defendant. Defendant's response was received 12:30, 25 November 1985 by U.S. Mail and does not allow for advance approval request to 10 day time limit imposed by this Honorable Court's Rules, Rule 83.1(b)(4); accordingly, respectfully request leave be granted by this Honorable Court, as exceptional "unique" case.

2. Defendant's Department of the

Army committed following fradulent actions:

(a) DID NOT submit Plaintiff's application to ABCMR of 19 Mar 1960; and,

(b) DID NOT submit Plaintiff's request for Retention on Extended Active Duty to the ADB based on his most current service, and requests/recommendation of approval by his Immediate Commander, Senior Field Grade Military Police Commander's and Intermediate Commander's to include First United States Army Commander, 19 Mar 1960.

(c) DID NOT comply with Secretary of the Army's Memo to the DA-ADB requiring verification of the records, qualification of adverse matter to be considered, and referral to Plaintiff PRIOR to consideration, which was not done, dtd 13 May 1960.

(d) Inspector General Report of Investigation (IG ROI) which was used as a basis for removal was wrongly given to the ADB, 15 FEB 1960 and 7 June 1960.

(e) DA DID NOT follow its own

Regulations, Directives, and Internal Standard Operating procedures, then in effect, in numerous instances by "Annual Screening" rather then "Removal Action" requiring representation by Counsel.

(f) Army contended from 1960 until 1967 that Plaintiff was voluntarily relieved from Active Duty, that he resigned. After seven (7) years of continuous correspondence-inquiries, the records were corrected as he received Separation pay. See TAB "V" Letter dtd 31 Aug 1967 and response dtd 26 Sep 1967 TAB "W".

(g) Assumed IG ROI was resolved in Plaintiff's favor because it never was referred to him for comment when finalized by IG, and thereby fraudulently withheld from Plaintiff. "AR20-1 par 27C: The complaintant must be informed...action taken".

(h) Persistently tried to have matter resolved but needed evidence. Army continued withheld information unfairly concerning completion of IG ROI making

recommendation elimination action on basis of alledged "prejudical matter" PRIOR final review by DA-TIGO Review Authority, completed on 3 Aug 1960, after Plaintiff had been relieved from active duty on 24 June 1960, an act of concealment and fraud. Plaintiff's records were improperly placed before the DA-ADB.

(i) Plaintiff's review of his DA Personnel File prior to 1960 separation, and on numerous occasions thereafter, found nothing in military records to indicate that ADB considered IG-ROI, nor was the ADB papers in file, only one paper stating Board Action of ADB in termination of his Indefinite Agreement Service on Active Duty. Therefore, records DID NOT contain material considered by DA-ADB.

(j) DA was required to notify Plaintiff of Prejudicial Matter so he could evaluate, and reclama or file Court action, this was not done, thereby Defendant is guilty of concealment and fraudulent action by ommission of proper

action.

2. Reason for this late litigation, in response to Defendant, is fact that DA failed to advise Plaintiff that he was relieved from active duty on recommendation of Ft Hood IG ROI, NOT "annual screening" criteria. AR 135-173 & 135-215.

3. The Court has not previously had the opportunity, as stated by Defendant, to review Plaintiff's contentions as stated in his reconsideration request due that it was returned by the Clerk's office as "MOOT."

4. Concerning Defendant's comments regarding documents submitted by Plaintiff. Documents were obtained from Defendant, show conclusive proof that the Plaintiff was "Hoodwinked" into believing that he was relieved through proper action by the DA-ADB, that his reconsideration request, application to ABCMR, and Recommendation of his Current Command and current duty performance was properly taken into consideration by the ADB; when

in effect, elimination action was initiated upon recommendation of the IG Fort Hood as approved by a "new" Commander without personal knowledge of Plaintiff or his duty performance, without giving Plaintiff an opportunity to examine his accuser's, or produce his requested witnesses, declared NOT available; and, not acting upon his appeal as requested under Defendant's Directives in "Sworn Testimony" of 4 November 1959 in response to Ft Hood IG Interrogatories. Thereby, proper assumption was made that upon examination of Plaintiff's response to Interrogatories, Sworn Testimony given directly to DA-TIGO, that alleged "prejudicial material allegations" were dismissed, and ER's were permitted to remain on file, as opinion of rating, indorsing, and reviewing authority though, per sworn testimony (possession of Defendant and furnished Court) of the former Provost Marshal General "were relieved" and reassigned by him. He recommended "purge ERs."

5. Defendant's record(s), as received by Plaintiff, and presented to his Honorable Court------show that "ADVERSE MATTER" of "PREJUDICIAL MATERIAL" was never qualified in accordance with Defendant's Army Regulation 640-98 as mandatory, nor investigation completed as required by his directives, specifically AR 15-6--Defendant's response to Plaintiff's comments in this regard are "SILENT", i.e. "concealment." 6. Defendant states "Plaintiff's contention is without Merit." But Defendant offers no reasonable explanation for Defendant violating its own Directives and Regulations which Plaintiff has relied upon in presenting his case, and by his comments has not objectively reviewed Plaintiff's case--or Defendant would have specifically discovered (Footnote 3) that LTC Freeman was the Fort Hood local IG investigating officer and LTC Clarke was the department of the army inspector general "reviewing officer" who had

briefed TIG--the alleged bias, prejudice, and foregone conclusions drawn by the Ft Hood IG, LTC Freeman, as approved by DA-TIGO with correspondence returned to Ft Hood thru Fourth USA, further stated by LTC Langan, DA-TIGO Rev Br "point out ..biased language..IG..depend fair & obj Inv."

7. Defendant's document(s) provided Plaintiff prove beyond any doubt that Defendant withheld document's prejudicial to the career of the Plaintiff as a Army Officer on extended active duty, thereby concealed facts pertinent to Plaintiff,thereby fraudulently denied; therefore, effected following action(s);

(a) Due process (Including, IG-ROI appeals prescribed in Par 30, AR 20-1.etc)

(b) Right to Counsel, face his accuser(s), and examination of testimony

(c) Examination of alleged Prejudicial Matter employed in elimination action, etc; and include denial request "show cause bd" - Special

OER-Probationary pd....

8. Defendant's IG-ROI contained allegations of "Perjury, Inventory Shortages, conduct unbecoming an Officer" without proof thereof, denied by Plaintiff, but not acted upon thereby Plaintiff again had to assume that he was cleared of the unfounded charges in absence of charges--disciplinary and/or administrative action.

9. With regard to Defendant's comments (Footnote 1 and 2). Documents submitted by Plaintiff were received from Defendant, he (Defendant) prevented Plaintiff from obtaining "new-clean" documents through this Honorable Court by stay of "Deposition, Discovery, and Admission" pursuant USCC Rule (s) 36 and 26.

10. Defendant submitted similar documents to this Honorable Court by App 1 and Plaintiff's Official Personnel File; some previously submitted to ABCMR.

11. Regarding TAB "R" question by Defendant, deception is made by stating that the ER was corrected per Plaintiff's

complaint to DA-TIGO requesting disqualification of "Rating Officer" because for a period of time, in effect, Rating Officer worked in his assignment as Unit Commander under the Staff Supervision/Control of the Provost Marshal and Plaintiff was assigned Assistant PM and PM in absence of PM in his functions. Upon receipt of the record in June 1979 it was discovered that the change effected was merely the indorsing officer (cmt by Indorsing Off. improperly removed) and submitted properly through Rating Officer's "UNIT" rating & Indorsing Officer and "PROPER" channels. Therefore, subject letter (TAB"R") was deceiving and NOT TRUE, and complaint was not resolved as presented. OER completed by Rating Officer "was not replaced."

13. Defendant continue's to refer to his confused question of the "IG cover sheet." Documents are in possession of Defendant, but as previously stated cover sheet is affixed to the 1959 IG-ROI as the TOP document as required by

Defendant's Regulation & Internal SOP, to the completed AFTER receipt of ROI or completion of IG ROI by DA to determine, if necessary that appropriate personnel action by TAGO maybe taken. (In Plaintiff's case this was accomplished AFTER the fact, and the reviewing officer, LTC CLARKE determined "CONTAINED NO PREJUDICIAL INFORMATION" which review in accord with Defendants DA-TIGO SOP is directed PRIOR to initiation of personnel action through utilization of a DA-TIGO Personnel Screening Review Board in case of Prejudical Matter.) (Refer Defendant's DA-TIGO SOP, then in effect.)

14. Defendant refers on page five to "these reports resulted in my premature release from active duty...". This comment refers to annotation, draft letters NOT finalized contained at one time in Plaintiff's record. In no way associated with knowledge in possession of finality of the Ft Hood IG-ROI, as sworn to under oath, and a matter of record in Defendant's possession and this

Honorable Court.

15. Defendant's reference to letter of 11 September 1959 regarding submission of interrogatories sent to Ft Dix NJ TIGO for response to by Plaintiff. As so many times stated, I again reiterate, I had no reason to suspect that--"THAT FORT HOOD INVESTIGATION, NOW IN QUESTION" sworn testimony of 4 November 1959---had resolved the allegation in Plaintiff's favor, so accepted by his Commander (Ft. Dix).

16. Plaintiff took in excess of 104 personnel actions, denied Plaintiff by Defendant's Department of Army who had ample opportunity to inform Plaintiff that negative action was taken because of alleged prejudicial material contained in his personnel file; however, Defendant's DA DID NOT advise Plaintiff, though required by his directives and procedure approved by the Secretary of the Army. Accordingly, there is no way that Plaintiff may obtain such material without Defendant's permission, and in acordance with Defendant's

Regulation(s), AR 640-98, AR 20-1 and AR 15-6 Defendant is bound to qualify such prejudicial matter and advise Plaintiff, which DA DID NOT do, thereby did conceal such matter from Plaintiff fraudulently, intentionally in violation of his own directives, denial of Plaintiff's due process, contitutional rights.

17. In addition, Defendant's documents reflect where the Ft Hood IG entered into my personal mail, to include congressional privy matter, and allegations regarding my family which are an invasion of privacy NOT addressed by Defendant. In this regard this Honorable Court's attention is invited to include other violations by Defendant as noted in following cases:

(a) Stephan W. Smith and Cynthia Dodd...v. Robert R. Pena and the United States Army, Defendants-Appellees. No. 79-1397 USCA 7 Ci 621F 2d 873 Oct 29, 1979.

(b) Church of Scientology of CA, Appellant v Shirley Foley, Et al No 77-2134 USCA DC Ci 640 F 2d 1335 Feb 20, 1980.

(c) In re: George I. Benny and Alexandria Benny, husband and wife, Debtors Case No 3-82-00873-LK USDC, ND of CA, 29Bankr 754:9 Collier Bank, Cas.2d (MB) 240: 10 Bankr Ct Dec (CRR) 921 Apr 14, 1983. OPINION: Furthermore the right of personal privacy is protected by both state common and constitutional law. Federal Agents may not open, read, and copy the personal mail of citizens without risking liability under the Federal TORT CLAIMS ACT for conduct which violates the right to be free from intrusion into one's private affairs. See US v. Birnbaum 588 F 2nd 319 (2d Cir 1978) Activities of CIA in opening, reading, photocopying letter which...

(d) Socialist Workers Party, et al., Plaintiffs, v. AG of US, et al Defendants. 73 Civ 3160 USDC 50 Distr of NY 463 F. Supp 515 Dec 18, 1978.

17. Plaintiff objects to Defendant's statement "also belied by his subsequent conduct" insinuation(s). Subsequent conduct described by commendable/outstanding ERs.

18. Defendant states "OER he now claims was fraudulently concealed" from him. (Page 110-114 Adm Rec) Subject letter dated 23 Oct 1969 has been reviewed and Plaintiff stands on the contents thereto and has to date NOT BEEN advised by Plaintiff to the contrary. ABCMR denied request arbritrary and capriciously. Facts are as reviewed in DA records upon personal inspection, OTAG, DA, in effect that is what this litigation is all about. Plaintiff, then nor now has had a knowledge of fact(s) for ligation prior to his discovery, FOIA, JUNE 1979. Court action can not be made on suspicion, and again I reiterate on the facts I had then, it was reasonable to assume, that the Fort Hood IG-ROI, now in question, under the given circumstances was discharged in favor of Plaintiff...DA has never advised nor denied to the contrary. Para 3 subject letter, I state "Ltr of 24 Jan 59, to the S/A through CG, Fort Hood, in rebuttal of an OER," apparently not forwarded to S/A.

I further stated "3.a. I NOW SUBMIT, IN VIEW OF THE SWORN STATEMENT BY MG H.L. BOATNER (Ret) ATTESTING AS TO THE "FIASCO" AND APPARENT COMMAND MISMANAGEMENT THAT EXISTED (WHICH, IN SUBSTANCE, SUBSTANTIATES MY LETTER OF 24 JAN 59), RESULTING IN ALL MP OFFICERS BEING RELIEVED OF ASSIGNMENT AT FORT HOOD (ALSO, ACCORDING TO PRESS RELEASES THE CG AND KEY STAFF MEMBERS WERE RELIEVED, AND: (1)...(2)...(3); following is extracted, as pertinent:

(a) Par 3 a (3) is quoted as follows: "(3) IG Investigation was not conducted in sufficiency of proof, based on the assumed fact that I was not served with a conclusive report of investigation or advised of my right to appeal of the IG report or opportunities afforded PAC in AR 15-185 dtd 1 July 1955 superseded by AR 15-185 8 Jan 62.

(b) Par (4) I <u>was not</u> furnished a copy of the SA "action letter" ...and/or findings with reference to my letter submitted through CG, Fort HOod to the

S/A. Accordingly, I had to assume that OER's were set aside as requested.

(c) "Par (5) Prejudicial allegations were made in those OER's rendered at Fort Hood, and General Biddle, relieved of Command, inserted a letter in my 201 file recommending retention of these OER's without informing or permitting me to examine such allegations or evidence, nor was I furnished a copy of the record of proceedings together with advise as to my rights to present further evidence, appeal and/or right to board action." (Discovered FOIA-NOT Gen. Biddle")

(d) "(6) In view of the fact that I had not been further advised of this prejudicial material, and it <u>was not</u> contained in my TAGO 201 file, when I examined the file prior to being RIF'd in 1960, or in fact the Secretary had not acted on my letters of 24 Jan 59" as of 3 Jan 87.

(e) "(7) Assumption made by me that the Secretary had determined in accordance with proper findings and

recommendations, facts contained in the record supported my letter of 24 Jan 59, and performance standards were apparently up to my contemporaries with assignment at Fort Dix NJ. Since, I had heard nothing to the contrary (LTC Canon was acquited) I terminated my attorney's service and anticipated a future "service career"."....etc. etc.

19. Subject letter of 23 October 1969 SHOULD PROVE BEYOND ANY DOUBT THAT I WAS NOT AWARE OF THE FORT HOOD IG-ROI CONCLUSION(S) OR RECOMMENDATION OF ELIMINATION ACTION; and, further prove, as evidence, that the Defendant has proved by their own document(s) furnished this Honorable Court. The ADB/ABCMR action on subject letter was simply denied, without hearing, and subsequently appealed with new evidence discovered over the years, and recommendation of DA Agencies. It is important to note and pertinent, Defendant NEVER advised Plaintiff of specific's, denied by DA-ADB without explanation, and/or ABCMR.

20. Plaintiff submits to this Honorable Court that, based on Defendant's Records as presented this Honorable Court there can be no reasonable doubt that Plaintiff was "HOODWINKED, DECEIVED, and INFORMATION was concealed through fradulent means, classification etc. Statement/fact, Discussion, Conclusions follow:

STATEMENT OF FACTS

1. Defendant violated the Federal Tort Claims Act.

2. Defendant withheld the true reason employed by a "SHAM" to eliminate Plaintiff's indefinate Active Duty Agreement.

3. Defendant intentionally "HOODWINKED" Plaintiff into thinking that he was relieved under Defendant's Regulation for "Annual Screening" - duty performance pursuant to AR 135-173 and AR 135-215.

4. That the Provost Marshal General furnished illegally, prejudicial material to the Department of Army Active Duty

Board to include an incomplete Inspector General Report of Investigation, which review subsequently was determined to "CONTAIN--NO PREJUDICIAL INFORMATION"--warrant personnel action(s) against subject individuals(s).

5. That the Department of the Army Active Duty Board excepted information, and acted there-upon without verification, contrary to Secretary of the Army prescribed guidelines/instruction to President of the ADB; and, further acted upon information NOT QUALIFIED pursuant to Defendant's Regulation 640-98 concerning "Adverse Matter"--to be considered by personnel actions and board(s).

6. That Defendant denied Plaintiff his "due process and appeal rights" as established within Defendant's own regulation, statute; and Constitutional Rights were violated.

7. That Defendant furnished his Promotion Board false, incomplete service record of Defendant's records thereby

causing Plaintiff to be passed over for Unit Vacancy promotion ahead of his contemporaries and mandatory promotion on a "FULLY QUALIFIED" basis--which qualifications Plaintiff exceeded, -- ERs TOP 10%.

8. That Defenant's ABCMR was requested to correct the record on nine separate occasions, knowing of reference to IG comments, and failed to inform or consider, subject comments in their deliberations prior to Plaintiff's discovery pursuant to Freedom of Information Act in June 1979. All previous references were directed towards Efficiency Report(s) rendered at Fort Hood without reference to "Prejudicial Material" reported by the Ft Hood Inspector General or

9. That Defendant's action is "Willful, Malicious, Wanton, and Oppressive; thereby, Plaintiff is entitled to punitive damages. Refer US District Court Case, Roanoke VA -- GLENN O. THORNHILL v. DUNNKENNY INC (1985);

and, as punitive damages Plaintiff has requested reinstatement with constructive promotion to grade of Colonel, O-6, and as deemed appropriate by this Honorable Court.

10. That Plaintiff was found medically fit for continued active duty, BUT NOT FIT for separation and subsequently retired for disability on 1 Oct 1970; and, found medically fit for assignment to the Active Army Reserves Technician Program, upon retirement, effective 2 October 1970.

11. As evidenced by the Defendant's action in presenting Plaintiff's Personnel Records to this Honorable Court; and documents obtained from the Defendant and/or their Agents by the Plaintiff, it is conclusive proof that the Defendant has perserved Plaintiff's records, apparently the Defendant was aware of the need to preserve evidence, at least in part, as pertained to Plaintiff's Military Career; therefore, "TOLLING THE STATUTE OF LIMITATIONS THUS

CREATES NO POTENTIAL FOR UNFAIR SURPRISE, REGARDLESS OF THE METHOD CLASS MEMBERS CHOOSE TO ENFORCE THEIR RIGHTS...". Refer LEXIS NEXIS NEXIS: "Level 1-4 of 1378 cases:

CROWN. CORK & SEAL CO., INC v. PARKER
No. 82-118. SUPREME COURT OF THE UNITED
STATES 462 U.S. 345: 76L. Ed. 2d 628: 51
U.S.L.W. 4746: 103 6 Ct 2392: 36 Fed.
R. Serv. 2nd (Callaohan) 621: 31 Fair
Empl. Prac. Cas. (BNA) 1697: 32 Empl.
Prac. Dec (CCH) P33.650. June 13, 1983.
OPINION:...414 U.S..at 555: see United
Airlines, Inc. v. McDonald., 432 U.S. 385.
395 (1977).

The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all members of the class. Tolling the statute of limitations thus creates not potential for unfair surprise."

12. That Defendant's Fort Hood and/or DA, TIGO failed to interview witnesses requested by the Plaintiff during their course of investigation, and Plaintiff's response to Interrogatories which contained a request for said witnesses, declared not conveniently available WITHOUT notification of Plaintiff. On 5 July 1985 reference to the Fact that Plaintiff was recommended for Elimination Action as a result thereof, by approval of the Commanding General, Ft. Hood. BCMR acted arbritary.

13. Adverse matter was placed in Plaintiff's personnel record without his knowledge, NOT QUALIFIED per Defendant's Regulation 640-98, subsequently referred to within Department of the Army Internal Personnel actions discovered in June 1979

through Freedom of Information Act.

14. There continues to remain documents of MP Activity and mis-management as stated by Major General Hayden L. Boatner former Provost Marshal General in sworn testimony--submitted with recommendation that subject Efficiency Reports received by Plaintiff be "purged." Military authority have denied access FOIA and Privacy Act--classified "SECRET", --arbitrary disregarded MG Boatner's cmts.

15. That Plaintiff has used diligence over a 25 year period to compell Defendant to reinstate him on active duty, NOT KNOWING that the Government "HOODWINKED" him into thinking that he was relieved from active duty under annual screening by the DA ADB. Thereby, Defendant has wrongfully deceived Plaintiff, committed the Act of Fraud through various personnel actions(s); and, therefore, the time limit for suing for fraud does not begin to run until the fraud has been

discovered, in this case, June 1979 within the six year statute of limitations, and three years of the ABCMR action which acted arbitrary and capriciously by not granting a hearing or act in light of Justice.

16. Under the circumstances described, the Defendant must be barred from using the Statute of Limitations defense-by estoppel, since Defendant DECEIVED PLAINTIFF thru "HOODWINKING" under disguise of "Annual Screening" given as the explanation for elimination of his active duty contract, thereby, induced the Plaintiff not to bring action since there was no grounds known to Plaintiff, until discovery of Defendant's deliberately "hoodwinked" Plaintiff into neglecting his own best interest by encouraging further appeals through ABCMR concerning removal of ERs, WITHOUT advising Plaintiff of the "Adverse Material" prejudicial to his interest NOT QUALIFIED under AR 640-98--placement in his personnel records. Plaintiff

responded to Defendant's response to an earlier inquiry pursuant to Freedom Information Act referring Plaintiff to Defendant's Commander, USA Res Comp Pers & Adm Ct...(INCL 1) regarding location of witnesses requested by Plaintiff during the course of the IG response--interrogatories. In this connection a (then Lt) Ronald E. Sullivan responded by (incl 1 - annotation) and Plaintiff sought him out, per letter of 4 November 1985 (Incl 2) to which witness responded by letter of November 12, 1985. Though this is not a notorized or sworn statement, Plaintiff submits it as further evidence of the incompleteness of the Ft. Hood IG ROI and the condition's during Plaintiff's assignment to enlighten this Honorable Court and Defendant's current officials (Incl 3). Mr. Sullivan's letter clearly stipulates his Character, creditability, and honesty by nature of his reply; and, relationship with Plaintiff was/is as stipulated therein, Mr. Sullivan further states "I

will be happy to do whatever is needed to clear up the matter."

DISCUSSION

1. Respectfully request this Honorable Court take Judicial Notice that the Plaintiff IS NOT an Attorney, without legal training, except for military exposure, is acting pro se.

2. The Defendant induced Plaintiff to delay bringing action by "HOODWINKING" plaintiff to believe that he had to exhaust his administrative remedies PRIOR to initiating litigation action, by continual referral to the ABCMR; and, per letter of 8 January 1983 referred Plaintiff to this Honorable Court, informing him that he had exhausted his administrative remedies within the Department of the Army, and further appeal should be submitted to this Honorable Court.

3. Defendant withheld the true reason of Plaintiff's elimination "by

reason of Inspector General, Fort Hood Recommendation" advising Plaintiff only that he was eliminated pursuant to "Annual Screening" due to poor performance of duty, in accordance with Defendant's Army Regulation 135-173 and 135-215; and

4. Plaintiff was not aware of the fact that the DA-IG, and OPMG, recommended Plaintiff's elimination through fraudulent information furnished the DA-ADB per DF of 15 Feb 1960, illegally, wrongfully thru employment of a "SHAM." On 7 June 1983 Plaintiff met with a Staff Member of ABCMR, a Mr Donald Lewey who brought up the issues of "illegal, wrongful and fraudulent separation" issue. Previously case had been submitted, appealed, based on ERs, Fort Hood with reference to IG comments in draft form referred to by annotation in his ER DA file, without specific refence to IG elimination/prejudicial material or qualified records per Defendant's AR 640-98. On 9 June 1985,

subject conference was confirmed by ABCMR pertaining to application to "purge" ERs "WITHOUT PREJUDICE" for remission, resubmission with Counsel concerning subject conference, resubmitted per letter dtd 14 September 1983; ABCMR again Arbitrary and Capriciously, denied Defendant's request: basis "UNTIMELY FILED", after Defendant accepted and returned application "WITHOUT PREJUDICE." All records in possession/custody of Defendant, furnished this Court in Appl, response to Complaint. Action initiated without immediate Commander's recommendation, and/or current duty performance for past year's evaluationn, disregarded Command rec'd.

5. Plaintiff acknowledges the six (6) year statute of limitations; however, since Defendant, acted fraudulently, illegally, wrongfully, as reflected in Defendant's own records, preserved by Defendant--The time limit within which to bring action for fraud, on the other hand does not commence until the fraud has

been discovered. In this case, should have been in June 1979, review of IG Report - files; however, Plaintiff did not suspect that the TIGO or PMG would conspire or make Fraud, wrongful, illegal action or furnish a Board with Fraudulent information; and, Plaintiff was not aware of this until he conferred with Mr. Lewey on 7 June 1983--in either event, action was filed with this Honorable Court within 6 years of discovery.

6. LACHES. Defendant objects based on Laches, coupled with Statute of Limitations. Plaintiff acknowledges fact that time is the principle involved here; and, the fact that the Defendant maybe less to defend itself UNDER THE NORMAL CASE; however, IN THIS "NORMAL" DOES NOT APPLY, since Plaintiff's case/argument is based solely upon Defendant's own record(s), PRESERVED by the Defendant, furnished Plaintiff pursuant to Freedom of Information Act and/or Privacy Act; and, therefore, since laches does not specifically limit the time when a

lawsuit can start; but, rather it is principle that says Courts should throw out Stale--long delayed charges, because as time goes on a Defendant may be less able to answer the charges or he may have believed that no legal action could not be started, that would BE A FALSE assumption in this case. The authority to apply laches principle rests within the discretion of Judges; therefore, it is respectfully, prayed, that this Honorable Court set aside laches in this case since the "case is not stale" within Defendant's knowledge, is constructed upon--solely of Defendant's wrongdoing, by their records and action--based on records preserved and furnished by Defendants--and fact that Defendant did in fact by Fraudulent Action(s) violate the Federal Tort Claims Act. That in bringing this suit, in enforcing Plaintiff's rights and due process denied by Defendant has if anything been a disadvantage to the Plaintiff and not the Defendant by passage of time, recognizing

LACHES as fairness, not specifying specific period of time, but depends on the facts of the particular case, Plaintiff, feels strongly that in all fairness LACHES should be set aside "clean hands" adopted based on the facts, and acts committed by the Defendant in prolonging this action thru delays, time consuming ABCMR actions--with arbitrary and capricious denials, and in light of former Provost Marshal General's (Major General Hayden L. Boatner) sworn testimony presented to an IG "in all fairness to correct an injustice", which he acknowledges as an effort to due justice by "purging ERs" in question or "watering down" in consideration of Plaintiff's overall record.

7. It is further recognized that LACHES, a defense to a suit in Equity that bars the Plaintiff from receiving relief from the Court. Equity is JUSTICE BASED ON FAIRNESS rather than on formulated laws. The principle of laches says that if a Plaintiff delays his suit

for so long that the defendant loses his opportunity to defend himself, Court Equity will, in effect, dismiss the case. The concept is reflected in the maxim. "The laws serve the viligent and not those who sleep on their rights." In plaintiff's case, Plaintiff did not sleep on his rights, but filed action which the defendant could assume, by Plaintiff's determination, diligence in pursuit, would end in litigation, just the opposite of the normal case, by persuing his right through appropriate DA channels, SA, and ABCMR. Plaintiff has diligently through the years EXPLORED each and every avenue administratively open to him to correct what he felt was an administrative in- justice to be corrected by the ABCMR. in his DILIGENT EFFORTS, he has submitted 104 actions with Defendant in his endeavors to obtain justice, correct his personnel ER records. Defendant had AMPLE opportunity to advise Plaintiff of the alleged prejudicial material sustained by the

Fort Hood IG/COMDR--advising him of the conclusion of the IG-ROI with recommendation of elimination action, and there is no excuse for violating his appeal rights submitted properly to DA-TIGO. However, Defendant made the decision to disregard Plaintiff's appeal, rights to due process, and Defendant's decision to violate his own directives, regulations and instruction to his ABCMR & ADB.. "elected" further not to advise Plaintiff of the prejudicial matter placed in his classified portion of personnel records, without his knowledge, further by "SHAM" eliminating Plaintiff through "PRIVY" of Command-IG-PM relationships, from service of his Country. Defendant has violated his own directives by remaining silent on his "hoodwinking" of Plaintiff. Therefore, Defendant should not be allowed now to hide behind the Statute of Limitations or Laches due to lateness of filing, delayed by Defendant in his administrative process, after concealment, classification, misleading the

Plaintiff by stating his eliminating was per "annual screening", due poor duty performance which, in this case was a "forest" since there was "NO ANNUAL SCREENING" per se, persona, a "SHAM". This Court is urged to recognize "Where there is right - there is remedy."

8. With regard to "Soverign immunity" in this case, is not applicable, due to Defendant's knowingly, intentionally, violating the Federal Torts Claim Act, and taking UNFAIR advantage of Plaintiff, and FAILURE by Defendant to disclose important, pertinent, fact in breaching Plaintiff's indefinite contract to serve on active duty in the Army, service of his Country.

9. Defendant speaks of the truth and "unreasonable" delays. Plaintiff may only state that he has diligently pursued the Defendant's procedures as given him, and THE TRUTH LIES IN THE RECORDS OF THE DEFENDANT, knowledge intentionally withheld from the Plaintiff though Plaintiff diligently pursued every known

course of action, as he gained knowledge, to purge ERs and regain his active duty status within the U.S. Army not leaving "ONE STONE UNTURNED", with many outstanding recommendations from Commander's of Colonel and General Officer rank, and Congressional personal acquintance with knowledge of Plaintiff's character, morals and leadership management abilities demonstrated; whom, were also deceived by Defendant into believing that the true cause for his elimination was "poor duty performance and recommendation of DA-ADB". Defendant "hoodwinked and deceived" by withholding the true reason for elimiation action thereby preventing Plaintiff from initiating litigation action. At no point did Defendant advise Plaintiff of the IG elimination action recommendation and/or findings approved of his investigation as required by Defendant's own regulation, acknowledged by DA-TIGO, required by Defendant's own directives, and internal operating procedure PRIOR to taking

personnel action resulting from an IG-ROI, AR 20-1 & DA-TIGO SOP, then in effect, in possession of Defendant. Further Plaintiff had no way of knowing of the false information contained in Defendant's PMG recommenation, per DF of 15 Feb 1960 to DA-ADB with recommendation to TIGO. Defendant disregarded Plaintiff's request of appeal contained within his 4 November 1959 response to Ft Hood IG thereby Plaintiff properly assumed that the Ft Hood IG-ROI was resolved in favor of Plaintiff, until discovery to the contrary June 1979.

CONCLUSIONS

1. Plaintiff has based his case on the "Defendant's records" proving intentional, wrongful, illegal, through fraulent action, and "sham" of misrepresentation of facts to the Department of the Army (DA), Active Duty Board (ADB), by the Office Provost Marshal General, D/A, in conjunction with the Inspector General's Office (TIGO), D/A, coupled with a biased, prejudiced

Inspector General Report of Investigation (ROI), conducted by an Inspector General (IG), Fort Hood Texas with foregone conclusion's as briefed by OTIG, D/A Review Authority; and, containing conflicting statement under sworn testimony and unsupported alleged prejudicial material transmitted to the D/A, ADB per Disposition Form (DF) submitted to the D/A ADB by the OPMG dated 15 FEB 1960, with subsequent reconsideration upon recommendation of TIGO based on a complaint submitted to TIGO by Plaintiff concerning an Efficiency Report (ER) received at Fort Dix, NJ., on 7 June 1960. Subject complaint was reported by TIGO as resolved in favor of the Plaintiff, but in fact was not corrected to satisfy Complaint submitted to DA-TIGO. On 7 June 1960 DA ADB sustained their action.

2. The IG-ROI was employed without Plaintiff's knowledge, through a "SHAM" to the ADB by representing the ROI as evidence for relieving Plaintiff from

Active Duty, by breaking his Contract for Indefinite period, in submission to the ADB in accordance with "Annual Screning" action in accordance with Defendant's Regulation, AR 135-173 and AR 135-215, fraudulently, and thereby "hoodwinked" Plaintiff to believe that he was relieved from active duty pursuant to "Annual Screening" requirements.

3. Screening action and instruction to the President of the ADB was taken in violation of Defendant's instruction by NON-VERIFICATION of the facts, and consideration of -- false information contained in DF of 15 Feb 1960 -- submitted by TPMGO in violation of AR 640-98 Defendant's directive on consideration of adverse prejudicial matter and qualifications thereof.

4. The ADB further ignored the guidance/instruction issued to the President of the ADB by the Secretary of the Army (SA) in accordance with appointment by LO AGPA-O DA Active Duty Bd (26 Jan 59), this office, 27 Jan 1959,

subject: "DA ADB," to perform these missions in Calendar year 1959. To assist the Board...

> "A similar letter was sent to the President of the ADB on May 13, 1960, by order of the Secretary of the Army. The 1960 letter was substantially identical to the one sent in 1959, except that the guidelines were modified as follows: c. "Adverse matter" that can be considered in personnel actions must be a part of official records. The Board must make sure that all information that is considered about an individual is QUALIFIED for such consideration under AR 640-98."......
>
> (CAPS & UNDERLINING ADDED FOR EMPHASIS- letters were destroyed by Defendant. However, quoted in US Ct Cl 186, JUANITA F. BIDDLE v. The U.S.; page(s) 110-111.)

5. The following five elements are present as required for proof of the "THE TORT OF FRAUD"; as evidenced by Defendant's Records, to harm Plaintiff & concealed:

(1) Statement of fact was made per DF dtd 15 Feb 1960, by Defendant stating incorrect, wrongful statements concerning Plaintiff's Official Personnel Record in possession of Defendant; and,

(2) The statement is false and OPMG did it knowingly that the information was false, as recorded in subject personnel files in their possession; and,

(3) The OPMG & OTIG knew that the information submitted to the ADB was false, biased, prejudiced and not in accordance with "Annual Screening" regulation(s), i.e. AR 135-173 and AR 135-215, and Instructions issued to the President of the ADB by the SA dtd 13 May 1960 PRIOR to their 7 June 1960 action; and,

(4) The ADB relied on the latter per comment (cmt) #4 Dtd 7 June 1960; and,

(5) Plaintiff was wronged as a result of the fraudulent action by elimination from the service of his Country, a constitutional priviledge and duty of responsibility and he was further notified per letter from Defendant dated 27 June 1960 OTIG, DA regarding his complaint concerning an ER received at Ft Dix NJ which was improper "HOODWINKED" to believe that it was corrected/resolved in his favor. Defendant intentionally withheld subject letter until Plaintiff was off active duty.

6. Further Defendant, knowingly, by his action committed the "TORT OF INTERFERENCE" with Plaintiff's contract to serve on Active Duty in the service of his Country, and thereby was wrongful interference by Defendant's PMG, and neglectful on part of the DA-TIGO by not properly reviewing subject ROI PRIOR to authorizing its use for improper

personnel action taken against the Plaintiff, an unlawful, wrongful act was indeed done, thereby, intentionally without justification and denial of Constitutional, Statutory, and Defendant's own Directives, Regulations issued and Standing Operating Procedures governing the required review of such cases PRIOR to taking personnel action against an Officer of the U.S. Army, and violation of Plaintiff's due process and entitlement to "Show Cause Board" pursuant to Defendant's Regulation (AR) 15-6 concerning allegation of prejudicial matter pertaining to Army Officer(s).

7. The Defendant "knowing the premises, and maliciously intended to injure Plaintiff.".. enticed Plaintiff to accept the alleged fact that he was relieved from Active Duty based on "Annual Screening" standards, by Defendant intentionally withholding from Plaintiff's knowledge the true reason he was terminated - eliminated from the service based on prejudicial material

developed and alleged by Defendant's OTIG, Fort Hood as presented per DA TIGO Cmt #1, DF, dated 13 May 1960, signed by Colonel Tilton, Chief, Investigations Branch, DA-OTIG.

8. Defendant's action has caused emotional anguish to Plaintiff over a 27 year period, with repeated requests by Plainntiff--to return to Active Military Service denied, allegedly due to "poor duty performance" and/or relief terminated by DA-ADB based on his prior service on active duty. Defendant further denied Plaintiff's promotion when he was "fully qualified" by submission of improper documentation, incomplete and containing error as to his true length of service as a commissioned officer, etc., thereby placing him improperly before the Promotion Board with error in record recorded on promotion data sheets submitted to subject Promotion Board. The "SHAM" action employed by Defendant is deemed extreme, substantial, wrongful, and intentionally. The emotional anguish

is great and particularly is prolonged, causing physical manifestation of mental suffering and bodily harm (such as hypertension, HBP, heart condition confirmed by Defendant's record) caused by Defendant knowingly.

9. Further the Defendant, by its own Directives and Regulations, in addition to Statutory and Constitutional Right deprived Plaintiff from entitlement to "DUE PROCESS and APPEAL RIGHTS" provided by Defendant's Standing Operating Procedures. By Defendant's regulations he was required to notify Plaintiff completion IG-ROI.

10. The Defendant was duty bound by its own "Standard Operating Procedures," Directives and Regulations owed it to the Plaintiff to advise him of the true reason for his elimination from the Indefinate Active Duty Contract entered into with the US Army to serve his Country, as he had done in PEACE & WAR TIMES; thereby, further establishing Defendant's negligence, Defendant failed

to use due care, breached that duty by negligence and that Plaintiff was injured and the Defendant's negligence caused the injury as stipulated in "Tort Law."

11. Defendant's DA-OPMG, per MEMO FOR RECORD of 8 Jul 1959, Colonel Turner (OPMG Personnel) said that office "does not desire taking action on this case unless report is completed to include compliance with par 38, AR 20-1"; hence, a biased and prejudiced investigation, so recognized by Defendant's review, was conducted and employed to eliminate Plaintiff from AD fraudulently, illegally, and wrongfully in that subject report was not conducted in accordance with Defendant's directive(s), i.e., AR 20-1, TB IG 2&4, and reviewed in accordance with Defendant's internal DA-TIGO SOP. By review after the fact, (damage was done), 3 Aug 60 after Plaintiff was separated from Active Duty on 24 June 1960; and, Plaintiff was deceived, "HOODWINKED" by Defendant advising him that he was relieved in

accordance with "Annual Screening" standards, AR 135-173 which was in effect false, fraudulent and in violation by the U.S. Government's wrongdoing--violated--The Federal Tort Claims Act," in violation, invasion of privacy, and libel, violation further of the U.S. Consitutional guarantees of right and due process, including right to face ones accuser(s).

12. Plaintiff had served a period in excess of 13 years when relieved from active duty, based in comparison, with a relative short 9 month tour within the same MP Battalion where Department of the Army's Record reflect existed grave strife, confusion and FIASCO, in addition conspiracies within subject unit are of record in Defendant's possession. Other then this short period of time Plaintiff had previously thereto, an Excellent to Outstanding record and was commissioned as a 2nd Lieutenant under Defendant's Regulations for OUTSTANDING performance as a non-commissioned officer and service

in a Combat Zone (Korea); subsequently ordered to active duty in his Reserve Status while serving as a Sergeant Major, General Staff of the Army. Plaintiff's performance, per Efficiency Reports and Records in possession reflect excellent to outstanding within the top 10% of his contemporaries; and was recalled to active duty in September 1968 as a direct result of his performance while serving with the Active Reserve Components, acknowleged as "OUTSTANDING and EXCEPTIONAL" in the position of Lieutenant Colonel, "Senior" Advisor to Commander (COLONEL) of a Direct Support Group, recommended for the Army Commendation upon completion of subject tour with STRONG recommendation from his Commander(s) for continuous indefinite active duty, denied by Defendant's DA, DESPER; and, since he was found medically fit for continued active duty, NOT FIT for separation while under medical treatment he was retired with 30% disability (Minimum allowed by law) by

the Defendant. (See FURLONG v. US 153 Ct Cl 557-563 (1961) Supra Note 1, 153 Ct Cl at 380. Armed Services Key 13,5(5), 23.4 (1). A MAN MIGHT BE CONSIDERED SUFFICENTLY FIT TO REMAIN ON ACTIVE DUTY BUT, AT THE SAME TIME NOT QUALIFIED FOR ORIGINAL APPOINTMENT" same applies to Separation. Upon separation, by medical examination, same Command, Plaintiff was found physically fit for assignment to the Active Army Reserve, position "Staff Administrative Specialist - Staff Personnel Assistant, Deputy Assistant Chief of Staff Personnel on the General Staff, 90th U.S. Army Reserve Command serving a five state area.

13. That, per letter of Ronald E. Sullivan attesting by his personal letter of the circumstances at Fort Hood the Inspector General DID NOT perform a thorough investigation, and apparently was, as previously stated, RESTRICTED to "privy" of immediate Command Chain & Staff personnel in obtaining sworn testimony, and that is in conflict of

each other's sworn testimony disregarded by the IG Investigating Officer. (Similar testimony is confirmed by sworn testimony of MG Boatner in describing the "Chaos" conditions at Fort Hood which conditions were so hard for a man of General Stature to conceive.) Mr. Sullivan, associated, as stated, with Plaintiff was not questioned by the IG, nor did he have knowlege of subject investigation, though it concerned his immediate Supervisor, i.e. Training Officer.

14. That Plaintiff wrote a letter-report to the Secretary of the Army on request of his Superior and Senior Commanding Officer, Colonel James F. Delany for the benefit of the Commander, MG William S. Biddle, dated 24 Jan 1959, detailing his experience and personal opinions/observations of MP Activity within Fort Hood, TX. Subject letter was prepared under the auspice of his Civilian Attorney, Robert O. Harris, Jr of the firm Crawford & Harris, Killeen, Texas and presented by letter of

transmittal (Incl 4) to the Commanding General, MG William S. Biddle on January 26, 1959 describing the general situation at Fort Hood. Plaintiff reported into other-on-going investigations conducted by Criminal Investigation Division and the Inspector General's Office, DA concerning mismanagement, alleged misconduct of a Senior MP Officer (Post Provost Marshal) who was subject of a General Court Martial, acquited, upon questioning of conspiracies by members of the General Court. These reports are referred to by Sworn Testimony of the former Provost Marshal General, MG Hayden L. Boatner, in detail. MG Biddle directed his Staff IG to conduct a detailed investigation of Plaintiff's letter; however, before completion, shortly after the initiation of subject investigation MG Biddle was relieved and his successor apparently "curtailed" the detail of the investigation privy to Command and IG. Details are in possession of Defendant, ie. MP Activity Report classified SECRET.

SUMMARY

WHEREAS, the Defendant has committed a violation of the Federal Tort Act; and,

WHEREAS, Defendant did intentionally "Hoodwink" plaintiff to believe that he was eliminated from Active Service to his Country by Defendant's regulations governing "annual screening"; and, in fact, this is in error, illegally, wrongful and based on fraudulent and/or improper qualified or verified record(s); and, thereby tolling the Statute of Limitations; and,

WHEREAS, Defendant acted contrary to its own published directives, regulations, and Federal Statutes and violated Plaintiff's guarantee of "due process, appeal, rights" further assured him under the United States Constitution by covert "coverup."

THAT IT BE RESOLVED that Plaintiff be reinstated on active duty in the United States Army with constructive promotion to grade/rank of Colonel (O-6) and

further granted back pay, allowances, and benefits as though he had never been relieved; and, that punitive damages be awarded in answer to his prayer as deemed appropriate by this Honorable Court, exhonerating Plaintiff.

DATED: 29 NOV 1985

BY: IRVIN JAMES HUNTZINER, Plaintiff
Major, U.S. Army, Retired
Attorney, Pro-se

18 Tree Haven Lane
Stafford, VA 22554-9251

PHONE: (703) 752-7562

CERTIFICATE OF SERVICE

I certify that I have deposited in the US Mail Service two (2) copies of this motion with attached inclosures, addressed to Defendant as follows:

Ms. Elaine J. Guth, Attorney
Commercial Litigation Branch
Civil Division, Department of Justice
Attn: Classification Unit
2nd Floor - TODD Building
Washington, D.C.

IV

DEPARTMENT OF THE ARMY
Board For Correction of Military Records
Washington, D.C. 20310

MEMORANDUM OF CONSIDERATION

IN THE CASE OF: HUNTZINGER, IRVIN J.
171-26-5891

BOARD DATE: 27 February 1985

DOCKET NUMBER: AC83-10121

INDEX NUMBER: 113.00

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present.

Mr. Dominic R. Ciccotelli	Chairman
Mr. James E. Vick	Member
Ms. Erin J. Hausman	Member
Mr. Karl Beilenberg Acting	Exec Sec
Mr. Donald L. Lewy	Examiner

The Board, established pursuant to authority contained in 10 USC 1552, convened at the call of the Chairman on the above date. Army Regulation 15-185, the regulation governing the operation of provides that applications and the

available military records pertinent to the corrective action requested will be reviewed to: determine whether to authorize a formal hearing; recommend that the records be corrected without a formal hearing; or, to deny the application without a formal hearing if it is determined that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records

Exhibit B - Military Personnel Records

APPLICANT REQUESTS: In essence, reinstatement on active duty, effective promotion to the grade of colonel (COL),

Army of the US and US Army Reserve (USAR) and, in correspondence submitted subsequent to his filing the current application, punitive damages.

APPLICANT STATES: The applicant has substantially reiterated most of the contentions he has made in his previous requests. He details the situation he perceived to exist at Fort Hood, Texas, in the period leading to his involuntary release from active duty (REFRAD). Essentially, one lieutenant colonel (LTC) was causing "chaos", and, when the applicant came to the LTC's defense, he became the victim of retaliation. The Board should look into an Inspector General (IG) Report of Investigation (ROI) concerning this LTC. He discusses his efforts, over the years, to obtain evidence and make his case, contending that this should excuse any failure to timely apply.

COUNSEL'S CONTENTIONS: Counsel submits six letters in support of the applicant's request. They are now filed in his

Official Military Personnel File (OMPF) and are incorporated herein by reference. Principal points raised include the following: The applicant was the victim of retaliation for noting serious problems at Fort Hood when he came to the aid of the before-mentioned LTC. His REFRAD was improperly based upon recommendations contained in an IG ROI resulting from the applicant's own allegations. The ROI was biased and imcomplete and could not be properly utilized in connection with his elimination. The applicant only recently learned of the use of this ROI in connection with his REFRAD, which is a reason to excuse failure to timely apply. Furthermore, on 19 Mar 60, he filed an application requesting retention on active duty, which should have tolled the statute of limitations. Favorable information, e.g., supportive endorsements from his chain of command to his rebuttal to the Active Duty Board, was fraudulently and illegally withheld from

the Department of the Army Active Duty Board (DAADB) when it reconsidered his proposed REFRAD in Jun 60. He was told that reconsideration had been predicated upon revision of an officer evaluation report (OER) for the period 18 Apr to 25 Sep 59. There are numerous instances of improper, illegal DA actions in connection with the applicant's elimination. Regulations were violated and the applicant was denied due process. The Army's action in relievig him from active duty was unfair and unjust.

In support of the applicant's request, various military documents and investigation excerpts (many of which have been annotated), correspondence, copies of regulations and court cases, and copies of Correction Board memoranda have been submitted.

EVIDENCE OF RECORD: Incorporated herein by reference are military records which show:

The Army Board for Correction of Military Records (ABCMR) has considered and denied

without formal hearings several previous requests of the applicant: (1) 11 Jan 60, remove OER's for periods 6 Jan to 26 Mar 58, 27 Mar to 30 Oct 58, and 1 Nov 58 to 26 Jan 59, all leading to his involuntary REFRAD; (2) 5 May 71, promotion to major (MAJ), USAR, effective 12 Jul 70, with physical disability retirement as a MAJ; (3) 28 May 80, reconsideration of first two applications; and, (4) 21 Jul 82 reconsideration of his first application. Copies of the pertinent memoranda are attached.

For the purposes of clarity, the following chronology is provided.

Date of Birth: 6 Jan 32

Active Duty: 29 Aug 46 to 25 Jul 49, Army Air Corps, Enlisted

12 Jun 50 to 25 Jan 57 Army, Enlisted

26 Jan 54* to 24 Jun 60 Army, Officer

6 Sep 68 to 1 Oct 70, Army, Officer

MFR: *Error of official record, carried forward from Promotion Board--ABCMR--Cl.Ct., Ct Appeals 54 should read 57.

Commissioned Second Lieutenant, USAR:

15 Aug 5[illegible]

Retired by Reason of Physical Disability:

2 Oct 70

Retired Grade: MAJ (Captain for pay purposes)

Percentage of Disability: 30%

NOTE: The applicant enlisted in the Air Corps at age 14, apparently using his brother's draft card. The Adjutant General (TAG) ratified this enlistment; therefore, he has received full credit for this period of service, notwithstanding the circumstances of his enlistment.

On 15 Feb 60, the Provost Marshal General recommended that the DAAB consider the applicant's elimination. The DAADB considered several substandard OER's and an 18 Nov 59 IG recommendation for the applicant's elimination. On 2 Mar 60 the DAADB notified the applicant of his proposed elimination. On 19 Mar 60, he filed a rebuttal letter, with which his chain of command concurred in six endorsements.

Also on 19 Mar 60 he filed an application for correction of military records requesting substitution of one OER for the period 18 Apr to 25 Sep 59 for another alleging an improper rating chain. He requested retention on active duty while his request was considered. Since he had not exhausted his administrative remedy, the application was considered by DA as a request for appropriate administrative action, and there is no record of the request ever being docketted with the ABCMR.*

On 29 Mar 60, he submitted a complaint to the DA IG about his OER's.

On 2 Apr 60, his 19 Mar 60 rebuttal letter led to DAADB reconsideration, and the original elimination recommendation was upheld.**

* Administrative remedies exhausted per letter 19 Mar 1960.

** Doc's, APX 150, 151 do not support 2 Apr 1960 ADB action. Fraudulent statement, action 2 Apr Branch transfer, APX P-149; and, 19 Mar 60 ltr was not considered by ABCMR or "ADB" (APP 106).

On 3 Jun 60 favorable action was taken by Headquarters DA regarding the applicant's OER complaint. A substitute OER for the period 18 Apr to 25 Sep 59 was filed in his OMPF, and he was notified that the DAADB would be reconsidering his elimination accordingly. On 7 Jun 60, the DAADB reconsidered his elimination for a second time and reaffirmed the elimination recommendation. A TAG Office message 082157Z Jun 60 was annotated to show that the DAADB considered all of the rebuttal material submitted by the applicant as well as the (favorable) endorsements therewith.

The Office of the Judge Advocate General (OTJAG), in a 3 Nov 83 comment to this Board, advised that the applicant has failed to timely apply as required by Title 10 U.S.C. 1552(b). (copy attached)

The OTJAG, in a 3 Feb 84 comment to this Board, reaffirmed its previous comment. (copy attached)

The OTJAG, in a 3 Aug 84 comment to this Board, advised that there is no

legal requirement to grant the requested relief. The determination as to whether the IG investigating officer was so prejudiced against the applicant as to make the investigation unreliable is a factual matter for ABCMR resolution. However, the referral to the DAADB clearly identified numerous other incidents, totally unrelated to the 1959 IG investigation that substantiated his 24 Jun 60 REFRAD. The applicant, given two reconsiderations by the DAADB, was afforded more due process than was required by regulations. Furthermore, use of the IG investigation was not made until specific permission to use it was sought and obtained from the DA IG. No regulations prohibited use of the investigation in administrative elimination proceedings. He was afforded full due process in connection with the IG investigation.

Title 10, United States Code, Section 1552(b), provides that no correction may be made unless the

claimant files a request therefor on or before 26 Oct 61, or within three years after he discovers the error or injustice, whichever is later. However, failure to file within the required time may be excused if the Board finds it in the interest of justice to do so.

In this case the Board considers that the date of discovery of the alleged error or injustice should have been the date of the applicant's REFRAD: 24 Jun 60. Accordingly, the last date for him to have timely applied was 23 Jun 63.

NOTE: The examining staff of the ABCMR, at the request of the applicant, reviewed the ROI of the LTC said to be causing "chaos" at Fort Hood. On 11 Oct 83, the ABCMR staff advised the applicant that, while the material did shed some light on the situation at Fort Hood in 1958-59, it was not deemed particularly relevant to his case. Therefore, the information had been returned to file.

DISCUSSION: Considering all the evidence, allegations, and information

presented by the applicant, together with the evidence of record, applicable law and regulations, and advisory opinions, it is concluded:

1. The applicant has provided no good reason to excuse his failure to timely file.

2. The applicant apparently knew of the alleged error or injustice upon his REFRAD in 1960. He began contesting various OER's that were key factors in his separation as early as 1969. Furthermore, he was fully aware of the IG's recommendation for his separation when it was made in 1959, as well as the fact that DAADB action occurred shortly thereafter. Therefore, the possibility of recent discovery of error or injustice is rejected.

3. His 1960 application did not request restoration to active duty. He was still on active duty. It requested retention on active duty pending resolution of his request. Due to his nonexhaustion of administrative remedies, his request was

properly handled administratively without ABCMR action. His request was granted as asked; he was retained on active duty while the request was pending; and favorable action led to a second reconsideration by DAADB, which also considered the favorable material submitted on his behalf. Hence, the 1960 application could not have effectively tolled the statute of limitations.

4. In two separate comments, the OTJAG concurs that the instant application is untimely.

5. The applicant's REFRAD in 1960 was accomplished in compliance with applicable, laws regulations and policies. The decision to separate him was supported by substantial evidence. Furthermore, there is no evidence of any substantive violation of any of his rights.

6. The voluminous submissions of the applicant have been carefully evaluated. As a result of this review, we are firmly convinced that there exists no probative evidence or convincing argument which

would justify granting the requested relief.

7. As correctly noted by the OTJAG, it was fully appropriate for the DAADB to utilize the 1959 IG investigation which recommended his separation. Notwithstanding his contentions to the contrary, there was no regulatory prohibition to use the IG findings in an administrative, vice criminal, proceeding, and there is no evidence he was denied due process in connection with the investigation. Moreover, the DA IG specifically sanctioned use of the ROI in connection with his elimination.

8. Neither the applicant nor counsel has submitted any probative evidence to show that the ROI was, in fact, inaccurate in any way. Nor have they established that the strong outspoken language used by the investigating officer was the result of bias, as opposed to being the result of the evidence. Mere use of strong language, in itself, does not establish bias when there is no compelling evidence to

show the strong language was unjustified.

9. It is most significant to note that the applicant's OER record, in itself, justified the applicant's separation. His three previous applications to this Board concerning three OER's as well as statements the applicant has made concede this.

10. The contention that the applicant's REFRAD was in retaliation for his support of an unpopular LTC is purely speculative and finds no support in the evidence of record. Whether or not this LTC caused Fort Hood or the Army confusion and consternation is irrelevant because it has no bearing on the applicant's fitness for active military service.

11. Irrespective of the fact that he may have been advised that DAADB reconsideration action was predicated upon modification of an OER, the fact remains that, when reconsideration was granted, the DAADB considered a complete record, including the favorable material that was submitted on his behalf.

12. In short, there is no evidence that the applicant's REFRAD was in any way unjustified, unfair or unjust.

13. This case has been before the ABCMR on four previous occasions. Even if relief were appropriate (and it is not), retroactive restoration to active duty twenty-five years later would be most impractical. Hence, favorable consideration is barred by laches.

14. It should be noted that neither the applicant nor counsel addresses the fact that since 1970, the applicant has been in a disability retired status which bars active duty from that point to this.

15. This disability retired status, his failure to establish that his 1960 REFRAD was in error or unjust, and the absence of any evidence that he was ever eligible for further promotion consideration precludes favorable action on his request for promotion to COL.

16. This Board has no power to grant punitive damages.

17. In view of the foregoing, there is

no basis to grant the applicant's request.

DETERMINATION: The applicant has failed to submit the application within the time required, to provide sufficient reasons for failure to do so, or to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice.

BOARD VOTE:

_____ _____ _____ GRANT _____

_____ _____ _____ GRANT FORMAL HEARING

_i/EH_ _i/JV_ _i/DC_ DENY APPLICATION

s/Donald L. Lewey

t/Karl Bielenberg
Acting Executive Secretary

DAJA-AL 1983/3106 (26 Oct 1983)

SUBJECT: Legal Opinion

TO: OSA, ABCMR FROM: DAJA-ALP

DATE: 3 NOV 1983

CMT 2 MAJ Garrett/sr/44586

1. It is the opinion of this office that the applicant has failed to make his application in a timely manner, as required by 10 U.S.C. 1552(b) and paragraph 7, AR 15-185. The applicant alleges that he was improperly released from active duty in June 1960; however, in view of the applicant's prior ABCMR applicants, voluminous correspondence with Government agencies, IG Investigations, Congressional Inquiries, and Freedom of Information Act requests, the assertion by the applicant that he did not discover the alleged error or injustice until 7 June 1983 is not convincing.

2. Request this office be provided a copy of the Board's final decision in this case.

FOR THE JUDGE ADVOCATE GENERAL:

(SIGNED)
JAMES O. SMYSER
Lieutenant Colonel, JAGC
Chief, Military Personnel
Law Branch
Administrative Law Division

4 Incl
nc

DAJA-AL 1984/1172 (25 January 1984)
SUBJECT: Legal Opinion
TO: OSA, ABCMR FROM: DAJA-ALP
DATE: 3 FEB 1984
CMT 4 CPT Carter/rj/76000

1. This office adheres to the opinion expresses in DAJA-AL 1983-3106, 3 November 1983, that the applicant has failed to make his application in a timely manner as required by 10 U.S.C. 1552(b) and paragraph 7, AR 15-185. If the Board makes a finding that the applicant's failure to file in a timely manner is excused in the interest of justice in accordance with the provisions of 10 USC 1552(b), this case may be resubmitted to this office for legal review of the merits, if deemed appropriate by the Board.

2. Request this office be provided a copy of the Board's final decision in this case.

FOR THE JUDGE ADVOCATE GENERAL:

(SIGNED)
JAMES O. SMYSER
Lieutenant Colonel, JAGC
Chief, Military Personnel Law Branch
Administrative Law Branch

DAJA-AA 1984/2404 (10 April 1984)

SUBJECT: Legal Opinion

TO: OSA/ABCMR FROM: DAJA-ALP

DATE: 3 AUG 1984

CMT 2 CPT Carter/rj/7600

1. It is the opinion of this office that the applicant's release from active duty (REFRAD) on 24 June 1960 was conducted in accordance with the applicable regulations (ten in effect) and that there is no legal requirement to grant the requested relief in this case. The specific alleged legal errors raised in the 9 September 1983 letter from the applicant's attorney are addressed in paragraph 2 below (the applicable paragraph numbers of the 9 September 1983 letter are referenced for clarity). In several instances the applicant's assertions of error are based upon reference to Army regulations which were not in effect at the time when the error was alleged to have occurred.

2. a. Paragraphs 1 and 2. The determination of whether the IG investigating officer was so prejudiced against the applicant as to make the findings and conclusions in the 1959 Fort Hood Inspector General investigation unreliable is a factual question for the Board to resolve. However, it is the opinion of this office that the 15 February 1960 referral to the DA Active Duty Board (Tab F of the applicant's supporting materials) clearly identified numerous incidents in the applicant's records, totally unrelated to the 1959 IG investigation, that substantiate the applicant's release from active duty on 24 June 1960 UP paragraph 58, AP 135-173 and paragraph 10, AR 135-215 (then in effect). Additionally the applicant was afforded additional due process not required by the cited regulations in that this case was reconsidered a second time by the DA Active Duty Board on 7 June 1960 pursuant to a 19 March 1960 letter from the applicant and a 29 March 1960

complaint to the DAIG concerning some of the applicant's efficiency reports. Modifications subsequently wee made to some of the applicant's OERs and his case was resubmitted to the DA Active Duty Board. Upon reconsideration, the DA Active Duty Board adhered to its original decision that the applicant be released from active duty.

b. Paragraphs 3a and 3d. The applicant's reference to AR 20-1, dated 29 January 1957, is incorrect as the applicable version of AR 20-1 is dated 16 July 1958. Paragraph 24e of the 1958 version of AR 20-1 does prohibit any adverse actions (with some exceptions that are not applicable here) against an individual "for registering a complaint." However, there is no evidence that the applicant's REFRAD action was initiated as a result of his registering a complaint but instead appears to have been initiated as a result of the annual screening of reservists' records required by paragraph 50, AR 135-173 and paragraph

10, AR 135-215 (then in effect). The restrictions in AR 20-1 (then in effect) on the use of IG investigations in criminal proceedings is not applicable to administrative proceedings. It is also noted that DAIG approval was obtained to use the 1959 Fort Hood investigantion to support the applicant's REFRAD action.

c. Paragraph 3b. While the purpose of the 1959 IG investigation was not to determine the applicant's fitness to remain on active duty, AR 20-1 (then in effect) did not prohibit other recommendations that the investigating officer thought were appropriate as a result of the investigation. It is noted that, contrary to the applicant's assertions, no adverse information from the IG investigation was filed in the applicant's records. Additionally, the version of AP 640-98 enclosed at Tab of the applicant's brief was not effective until 15 July 1965.

d. Paragraphs 3c and 3e. IAW paragraph 38, AR 20-1 (then in effect)

the applicant was provided an eight page notification letter, dated 11 September 1959, which outlined the prejudicial material against him developed by the IG investigation. The applicant acknowledged receipt of this letter on 9 October 1959 and submitted a twelve page rebuttal, with 15 inclosures, dated 4 November 1959. These rebuttal materials are attached as Tab AB to the IG investigation. Neither the applicant's ABCMR application nor the IG investigation contain any testimony purportedly given by the applicant to the DAIG on 30 January 1959. The applicant's 7 February 1959 testimony to the DAIG is recorded at Tab B-13 of the investigation. The applicant had no right to a polygraph examination.

e. Paragraph 3f. Neither regulatory nor constitutional due process required that the applicant be given the right to confront and cross examine witnesses in conjunction with an adverse IG investigation. The applicant was

afforded full due process when he was notified of the prejudicial material against him and permitted to submit rebuttal material (see paragraph 2d above.)

f. Paragraph 4a. See discussion at paragraphs 2a, b, d, and e above.

g. Paragraphs 4b and 4c. The language in paragraph 50, AR 135-173 (then in effect) that required the forwarding of appropriate officer records to the Active Duty Board without recommendation and in paragraph 51 that required prior referral to the officer for rebuttal, was implemented by Change 4, dated 22 July 1960, after the forwarding of the applicant's records to the Active Duty Board. Furthermore, it is the opinion of this office that even if these provisions had been in effect, the inclusion of a recommendation for REFRAD would be harmless error and would not invalidate the applicant's REFRAD. It is obvious that any referral to the Active Duty Board based upon an annual screening

of records, with or without recommendation for disposition, could include only the records of those officers whom the referring officials thought should be REFRAD. Additionally, the applicant did submit rebuttal material to the IG investigation which was the sole basis for the general officer recommendation for elimination identified at Tab a of the applicant's application. Also see the discussion at paragraph 2a above.

h. Paragraph 4d. See the discussion at paragraph 2a above. MG Boatner's statment is based upon the false assumption that the applicant's REFRAD was based solely on his efficiency reports for his conduct during the 9 month period at Fort Hood in 1959 when the IG investigation was ongoing (see page 5 of the statement at Tab X of the applicant's application).

3. Request this office be provided a copy of the Board's final decision in this case.

FOR THE JUDGE ADVOCATE GENERAL:

(SIGNED)
KEVIN W CARTER
Captain, JAGC
Military Personnel Law Branch
Administrative Law Division

Memo for the Record:

1. All references in error were corrected and properly submitted to ABCMR.

2. Advance directive issued by Secretary Army to President DA-ADB dtd 13 May 1960. See Biddle v. US (App 28) US Ct Cl 87, 186, confirmed C4 AR 135-173.

s/I. J. Huntzinger

BRUCE E. STEVENSON
Attorney At Law
424 South Washington Street
Alexandria, Virginia 22314
(703) 836-5888

September 9, 1983

Department of the Army
Board for Correction of
Military Records
Washington, D.C. 20310

Re: Irvin James Huntzinger, Sr.
Document No. 4327

Dear Mr. Matthews:

In reference to the 9 June 1983 letter from Mr. M.M. Susinna of your office in referenced case, please be advised that I have been retained to represent Major (Ret) "Jim" Huntzinger, in his case before your Board, (Inc. 1)

Major Huntzinger is specifically requesting reinstatement on active duty, retroactive to June 1960, as a Lieutenant (AUS) in the United States Army along with constructive promotion to the rank of Colonel and back pay and allowances and other relief from June 1960 when he was illegally "eliminated" from active military service at the instigation of MG Earle G. Wheeler (Tab. A).

The basis for the requested relief is as follows:

1. In January 1960, Major Huntzinger was specifically requested by Colonel James F. Delaney, 0337026, Deputy Post Commander (DPC) of Fort Hood, Texas on behalf of MG William S. Biddle, 015180, to submit a letter to MG Biddle, which was subsequently changed to a submission directly to the Secretary of the Army, outlining operational deficiencies which, then, Lt. Huntzinger observed in Military Police operations at Fort Hood, Texas in 1959. This letter was requested but not initiated by Huntzinger as a result of his rebuttal to an unsatisfactory efficiency report and an on-going investigation of MP activities and the conduct of Lt. Col. Jack Y. Canon, Post Provost Marshall, Fort Hood, Texas. A copy of this letter was also furnished to Col. Paul V. Bissell, Office of the Inspector General. It appears that the office of the IG, felt that Huntzinger's letter was a "red herring" to assist

LtCol Canon who was the subject of an investigation at Fort Hood (Tab. B). As a result of this letter, MG Biddle directed the Fort Hood Inspector General to conduct an investigation of Huntzinger's observations (Tab. C).

2. The investigation was then initiated but the individual conducting the investigation, LTC M.I. Freeman, became so prejudiced against Lt. Huntzinger that he concluded that Huntzinger is "not now qualified mentally or morally to be an officer of the Army in any capacity" (Tab D). It should be noted that Huntzinger did not initiate any IG complaint voluntarily but was merely following the orders of MG Biddle in providing his good faith personal opinions and experiences concerning events at Fort Hood to the Inspector General. As a result of the prejudiced conclusions of LtCol Freeman, Hqs, DA, Office of the IG recognized the "biased language" with improper conclusions and opinions used by LtCol Freeman against

Huntzinger before his investigation was completed and concluded that LTC Freeman's comments reflected "unfavorably on the IG system generally, and on all who have had a part in handling this matter specifically." Even though bias was recognized, the same investigating officer was allowed to complete the biased investigation which later formed the basis for Huntzinger's elimination from Military Service. In fact, Huntzinger requested a polygraph examination to substantiate the truthfulness of his allegations but it was not given (Tab E).

3. In addition, to the lack of due process in having a prejudiced investigating Officer conduct the IG investigation, the following specific prejudices are noted:

a. The IG Report of Investigation was used to support the elimination of Huntzinger as reflected in paragraph 6 of the DF to the Army Active Duty Board (Tab F) but this violates paragraph 24c of AR 20-1 which states that "any type of

disciplinary or other adverse action against an individual for registering a complaint, except as provided for in paragraph 25 is prohibited. Consequently, as the IG report was illegally used to support Huntzinger's elimination, this regulation was violated. Paragraph 25, of AR 20-1 is not applicable as Huntzinger comments were not proven to be intentionally untruthful and the disciplinary action contemplated by this regulation is not elimination from the Service without being given an opportunity to rebut the IG conclusions nor to demonstrate that his allegations were not intentionally untruthful.

b. Paragraph 63 of Section VII, Recommandations of the IG Report of Investigation concluded that Huntzinger should be eliminated from the service (Tab H). However, the primary thrust of an IG investigation is to determine the truthfulness or falsity of allegations and not to determine whether a person should be eliminated from the service.

Such action is properly the function of another action under another Army regulation wherein Huntzinger would be entitled to be present and allowed to present evidence on his behalf and have other "due process" protection. Further, if the IG Report was to be used in such a prejudical manner, the provisions of AR 15-6 would apply regarding prejudical allegations giving "due process" rights to Huntzinger. (Tab I) Again, this was not done! Consequently, as the purposes of the IG investigation was not to determine the fitness of Huntzinger to remain on active, paragraph 27 of AR 20-1 was violated when the IG made such a recommendation. (Tab J) The placement of this adverse information in the Official Records of Huntzinger also violated AR 640-98 as Huntzinger was not afforded his rebuttal and other rights. (Tab K)

c. Paragraph 29d of AR 20-1 states that when an action on a complaint is completed, the IG will be responsible for insuring that an appropriate reply is

made to the Complainant. Further, paragraph 32, AR20-1; and paragraph 32b AR20-1, states that an appeal can be taken of an IG action. (Tab L) However, Huntzinger was never informed of the final action of the IG investigation as also required by paragraph 74, TBIG4 (Tab M) as this report was only forwarded to HQS, Department of the Army and, hence, Huntzinger was precluded from exercising his appeal rights. Consequently, as these regulations were not complied with by the Department of the Army, Huntzinger was again denied Administrative due process. In this connection, it should be noted the IG recognized its obligation to forward a copy of the completed IG Report to Huntzinger in paragraph 3 of a DF, dated 17 August 1959 but this was never accomplished, obviously, for the reasons also reflected in the same paragraph. (Tab E)

d. The IG Report was given to the Active Duty Board, to use as evidence to support the elimination of Huntzinger

from the service contrary to paragraph 42, AR 20-1, which specifically precludes the furnishing of the IG Report to the Board for such purposes. (Tab N)

e. While at Fort Dix, New Jersey, in November 1959, Huntzinger was requested to reply to prejudical material developed during the course of the Fort Hood IG investigation. He submitted a written statement requesting that his approximate 35 page testimony to the DA, IG office on 30 January 1959 and 7 February 1959 be included in his reply and a polygraph examination be administered. However, this was not accomplished and, therefore, the IG Report was incomplete and should have been disregarded for all purposes as Huntzinger's complete rebuttal testimony was never considered. (Tab O)

f. Administrative due process requires that a person against whom adverse action is taken, be given the opportunity for a hearing and to be confronted and cross-examine the witnesses against him

as well as presenting the testimony of witnesses in his behalf. When Huntzinger was notified that he was, in effect, being investigated, he asked for various witnesses to be present. However, witnesses who had previously made a statement were not made available for cross-examination even though they were available at Fort Hood nor were all the witnesses called which were requested and reasonably available. (Tab P) Consequently, lack of administrative due process mandates that Huntzinger be given the relief requested.

4. Further, Major Huntzinger was illegally relieved from active duty for the following reasons:

a. The previously mentioned IG Report was improperly furnished to the Active Duty Board as it was prepared by a biased investigating officer and was not conducted in compliance with appropriate regulations which denied Huntzinger administrative due process. (See para 2&3 above.) In fact, on 3 August 1960, the

Office of the Inspector General, determined the IG Report contained "No prejudicial information", obviously, to protect Huntzinger from the impact of this investigation which was recognized as being biased and unfair. (Tab T) However, the damage had already occurred as this IG Report was furnished to the Active Duty Board and illegally used as the basis for his separation.

b. Major Huntzinger was recommended for release from active duty by MG Haydon L. Boatner. (See para 3, Tab F) on February 15, 1960. Improper prejudicial comments were made in this document which was illegally furnished to the Active Duty Board along with the previously mentioned IG Report. As a result of this recommendation, Huntzinger was relieved from active duty (Tab Q) on the basis of AR 135-173, during annual screening (Tab R). However, this recommendation for elimination was improperly furnished to the Board as appropriate Army regulations were not complied with as follows:

1) Paragraph 50, AR 135-173 specifically states that the Chiefs of Arms and Services will forward, <u>without recommendation</u> the records of officers to be considered for release or elimination. (See Tab S which restated messages in effect in January 1960). However, such a recommendation was made by MG Boatner!

2) This regulation was also violated as the IG Report furnished to the Board also contains specific recommendations for elimination of Huntzinger by at least one General Officer (Tab A). However, paragraph 51, AR 135-173, specifically states that prior to forwarding such a recommenation, the commander will state the reasons for the recommendation, in detail, and then refer it to the officer for rebuttal and comment which was not done in Huntzinger's case.

c. Information contained in MG Boatner's illegal communication to the Active Duty Board (Tab F) contains many inaccuracies which Huntzinger was not able to rebut as follows:

1) MG Boatner states that Huntzinger has no future potential as an officer on active duty in the U.S. Army. This statement in paragraph 3a (Tab F is clearly untrue because MG Boatner should have contacted the Commander, Fort Dix, New Jersey for current information concerning Huntzinger's value to the services. If this had been done, information would have been obtained that Huntzinger was an outstanding officer as reflected in correspondence submitted to the Department of the Army requesting his retention on active duty. (Tab U) This is a further indication of the obviously prejudical investigation held by the Fort Hood IG which was critical of Huntzinger and furnished to the Active Duty Board along with the unfair and incorrect comments of MG Boatner.

2) Paragraph 3b of MG Boatner's DF (Tab F) states in effect, that Huntzinger was released from Artillery school prior to graduation because of unsuitability for further schooling. This

is again a false statement as Huntzinger was recommended for further schooling and recognized as possessing outstanding qualities of leadership (Tab V). He only had a slight deficiency in mathematical ability becuase of his lack of prior mathematical schooling but his other abilities and characteristics were clearly recognized as outstanding and he was, in fact, given credit for the basic course as reflected in item 28 of his DD 214 (Tab R) separation certificate.

3) MG Boatner was given incorrect information concerning Huntzinger abilities as paragraph 3h only contains comments from one officer. However, the Provost Marshal, rated Huntzinger in the top 10% of MP officers with similar experience (Tab W).

d. MG Boatner clearly recognized the injustice in this case and made a sworn statement to the 4th Army IG on 2 May 1969, reflecting that Huntzinger was not rated fairly at Fort Hood and should be given relief. (Tab X)

In conclusion, the facts of this case reflect numerous instances of improper and illegal action taken by the Department of the Army in eliminating Major Huntzinger from the U.S.Army. Clearly, he was denied administrative due process as the U.S. Army did not follow its own regulations in causing Huntzinger to be eliminated from the service. Further, MG Boatner rescinded his previous recommendation that Huntzinger should be released from active duty which should be conclusive evidence establishing an injustice in this case!

It is obvious that the U.S. Army used the Active Duty Board as a "sham" to eliminate Huntzinger from the service. If Huntzinger were to be eliminated from the service, he was entitled to a hearing under other regulations, allowed to present evidence in his behalf, and entitled to other safeguards to prevent the injustice inflicted upon Huntzinger. Consequently, the Secretary of the Army is respectfully requested to exercise his

authority to grant the necessary relief to Major Irvin James Huntzinger, a dedicated and patriotic American, who was subsequently recalled to active duty in 1968 during the Vietnam conflict after his outstanding abilities were finally recognized.(Tab Y)

Sincerely,

Bruce E. Stevenson

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January 13, 1984

Army Board for Correction of
Military Records
Department of the Army
Washington, D.C. 20310

Attn: Mr. Lewey Re: Pending ABCMR Case
Major Irvin J. Huntzinger

Dear Sir:

Section 1552 of Title 10, US Code, provides that no correction may be made to a military record unless a request is filed within 3 years after the alleged error or injustice is discovered. In this connection, the injustice is the imporper relief of Major Huntzinger from active duty in June 1960 by use of improper evaluation procedures by the Active Duty Board. In March 1960, Major Huntzinger filed an application before this Board to have certain efficiency reports removed from his records. At that time, he only had knowledge that his efficiency reports were prejudiced and not that the active duty board would be considering improper evidence in relieving him from active

duty.

He was not successful but he continued his efforts to obtain evidence to support his allegations of impropiety. He continued to correspond with the Department of the Army concerning his reliev from active duty as he was initially informed that he voluntarily resigned from active duty. The Department of the Army finally recognized its error in 1967 and paid Major Huntzinger his separation pay as a result of his relief from Active duty in 1960.

Major Huntzinger still continued his struggle for reinstatement on active duty and was placed in an USAR/active status for 85 days in 1966; 139 days in 1967 to attend the advanced course; and then full time active duty from 6 September 1968 to 1 October 1970 when he received a disablity retirement. He filed another application before this Board in 1968; and again in 1970. Since that time, he has continually contested his prejudicial efficiency reports and relief from active

duty. However, it was not until 1980 that Major Huntzinger first received information that the Active Duty Board considered the IG Report of Investigation and other documents in relieving him from active duty. Even at that time, he did not know that such action was improper as he did not have the Army Regulations prohibiting such practices.

Major Huntzinger, tenaciously, as he had in the past, pursued his goal of correcting his improper relief from active duty by requesting pertinent army regulations, some of which were furnished to him January 1982. As these regulations reflected improper action of the Active Duty Board, Major Huntzinger requested the Secretary of the Army for reinstatement on active duty based on a prejudicial Inspector General Report received by Major Huntzinger in 1980, thus exhausting his administrative remedies. After this was denied, Major Huntzinger filed another application before this Board. This action was filed

within 3 years after discovery that the Inspector General Report and other documents were improperly considered by the Active Duty Board in 1960. Furthermore, since his initial application which related to his improper relief from active duty was filed within 3 years from his relief, his subsequent applications to the Board regarding the same subject were merely additions to his original application and, therefore, timely filed.

Also, it is in the interest of justice to accept this application as it is obvious that Major Huntzinger has conscientiously pursued his goal of correcting his military record over a considerable period of time. He has accumulated almost 3 feet of records and expended approximately $5,000.00 to correct this injustice. Consequently, his appeal should not be denied on the grounds of timeliness.

The Judge Advocate General of the Army in a brief paragraph opines that the

application is untimely but it is obvious that no substantial research in determining the actions of Major Huntzinger in attempting to correct this injustice were made prior to writing this opinion as there aremany cased cited in the Board's own files as well as Federal Court cases which unequivocally support the timeliness of Major Huntzinger's current application before the ABCMR.

Sincerely,

Bruce E. Stevenson

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January 27, 1984

Army Board for Correction of
Military Records
Department of the Army
Washington, DC 20310

Re: Major Irvin J Huntzinger
SS # 171-26-5891

Dear Mr. Lewey:

Again in reviewing the voluminous material which has been accumulated by Major Huntzinger in over 20 years of attempting to be restored to duty as a result of improper action by the Active Duty REview Board in 1960, I have just discovered that the Officer of the Provost Marshal General, U.S. Army, deliberately and fraudulently, failed to furnish the Active Duty Board with the recommendation of the Commanding General U.S. Army Training Center, Fort Dix, New Jersey (Tab U) that Major Huntzinger be retained on active duty in 1960.

On 19 March 1960, Major Huntzinger forwarded correspondence to the Adjutant General, Department of the Army,

requestinng reconsideration of his retention on active duty by the Active Duty Board. This request was supported by numerous letters of recommendation (See Tab U of previous submission) and contained favorable recommendations by his immediate Commanding General as well as the Commander, First United States Army, Governors Island, N.Y. as reflected in 17 inclosures to this letter.

The Active Duty Baord has the inherent authority to reconsider its decision based on the overall record of Major Huntzinger to include his service at Fort Dix, N.J. as this information was not presented to the Active Duty Board prior to making its initial unfavorable decision because Major Huntzinger was not notified of referral of his case to the Active Duty Board as required by Army Regulation 135-173, paragraph 51, (Tab S). In any event, one of Major Huntzinger's efficiency reports was being appealed and would be reconsidered by the Active Duty Board on 7 June 1960 which

could have also been furnished with information concerning his service at Fort Dix, N.J. (Deposition Form comment 1 at Tab AA).

However, the Active Duty Board was not furnished with Major Huntzinger's request for reconsideration (Tab U), as paragraph 1 of comment 5 (Tab DD) states that only the information contained in comment 2 (Tab BB) which was his efficiency report from 18 April 1959 to 27 September 1959 was reconsidered by the Active Duty Board. Further, comment 3 reflects that only information concerning his disputed efficiency reports was contained in the information furnished to the Active Duty Board for reconsideration. (Tab CC) This conclusion if further reinforced by comment 3 to the 13 May 1960 Disposition Form forwarding the basic correspondence with 5 inclosures (not including Major Huntzinger's request for reconsideration) to the Active Duty Board on 6 June 1960, (Tab CC), again, with an improper

recommendation from the Office of the Provost Marshal General. Furthermore in comment 4, the DA Active Duty Board acknowledges that they only received the additional information contained in the 13 May 1960 Deposition Form in reconsidering its decision to revoke Major Huntzinger's indefinite service agreement (Tab CC). This conclusion is also supported by the fact that all comments are made to the 13 May 19060 Form and not to Major Huntzinger's 19 March 1960 letter.

Further evidence to indicate that information favorable to Major Huntzinger was deliberately and fraudulently withheld from the Active Duty Board by the Acting Provost Marshal General is the 7th indorsement to Major Huntzinger's letter from Department of the Army which indicates that only the changed efficiency reports were considered by the Active Duty Board. (see para 1) (Tab EE) Additionally if Major Huntzinger's letter was considered by the Board the 7th

indorsement would have reflected that this favorable material was forwarded to the Active Duty Board as was the case in forwarding the 16 May 1960 Form to the Board from OPMG (comment 3, Tab CC).

In conclusion, overwhelming evidence indi- cates that information favorable to Major Huntzinger was not forwarded to the Active Duty Board for reconsideration as required by regulation and within the inherent responsiblity of the Board. Paragraph 51, AR 135-173 (Tab S), requires that Major Huntzinger be informed of contemplated release action by his Commanding Officer. As this was not doen, he was prevented form submitting favorable Fort Dix, N.J. information to the Board initially. However, the Board should have subsequently considered the favorable evaluation as it was required to review all records prior to rendering a decision (see para 50 AR 135-173, Tab S) and letter of instrucions from Secretary of the Army to the ADB which has not been

obtained, as yet. This again reflects gross misconduct on the part of the Office of the Provost Marshal General which should not be tolerated by the U.S. Army.

Major Huntzinger has been diligently pursuing reinstatement on active duty and his applications for ABCMR Relief have been considered by the ABCMR each and every time he has uncovered new evidence to support his claim of improper treatment. Certainly, no one can say that he has not been persistant! It is self evident, that the Freedom of Information Act was passed to correct the abuses of the government. Major Huntzinger (who is not an attorney) took advantage of the Act to obtain information that was originally concealed from him. He submitted various applications to the ABCMR to correct the obvious injustice done to him in a timely fashion. The ABCMR by considering Major Huntzinger's numerous applications for the ultimate purpose of being restored to active duty

certainly recognized the validity of his claim and by allowing him to withdraw without prejudice, and amend his current application and determined that his claim should be considered in the interest of justice. It should be emphasized that Major Huntzinger was continually told by ABCMR personnel that he must first eliminate his adverse OER's in order to be restored to active duty and this is the course he pursued as he had no knowledge until recently that the Active Duty Board acted imporperly in relieving him from active duty. In any event, basic fairness and the interests of justice requires the favorable consideration of Major Huntzinger's application to correct obvious and deliberate misconduct by the military establishment. However, if the ABCMR decides to determine this case on a procedural matter i.e. Statute of Limitations, Laches etc., request time to file a formal legal brief.

Sincerely,

Bruce E. Stevenson

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March 30, 1984

Secretary, Army Board for Correction of
Military Records
Department of the Army
Washington, D.C.20310

Re: Major Irvin J. Huntzinger
171-26-5891

Dear Sir:

In accordance with my recent conversation with Mr. Donald Lewey of your staff, I am submitting additional information on behalf of Major Huntzinger to support his request to be restored to active duty and/or receive appropriate compensation.

The Judge Advocate General of the Army has opined that Major Huntzinger has not made a timely application to the ABCMR for relief based on his previous efforts in attempting to correct his military record. Certainly, the fact that he has diligently pursued his goal to be restored to active duty supports the conclusion that he has not waived any of

his rights in this regard and placed the Department of the Army on notice that an injustice had occurred in his case. In this connection, please see ABCMR Decision AC 68-02874J (Inc. 1)

Obviously, Major Huntzinger did not initially know the exact nature of the injustice but merely wanted to serve his country to the best of his ability, which he did in an outstanding manner both prior to June 1960 and during his subsequent recall to active duty. However, in 1960, Major Huntzinger was informed by his Career Management Branch, Col. Turner, and Captain Walter K. Jenkins, Company Commander, LTC W.F. Farrell, Batallion Commander, Col. Hundley Thompson, MPC, Provost Marshal, all of Fort Dix, New Jersey, that his efficiency reports at Fort Hood caused him to be relieved from active duty as everyone assumed that the Army followed its own regulations in relieving Major Huntzinger from active duty. Consequently, he wrote his 19 March 1960

letter to the Adjutant General requesting to be retained on active duty. This is the letter which contained strong recommendations for his retention on active duty which was illegally withheld from the Active Duty Board (Tab U). (See my letter of January 27, 1984 and the M/R to the 4th IND. (Inc. 2) reflecting that reconsideration was only accomplished by MPC). Since this illegal conduct on the part of the Office of the Provost Marshal General was a recent discovery of an error or injustice within the 3 year statute of limitations, the current ABCMR application should not be barred.

It should be noted that Major Huntzinger's letter of 19 March 1960 also included, as inclosure 13 therof, an Application for Correction of Military Records (Inc. 3) which was not considered by the ABCMR, contrary to Army Regulations, as it was never forwarded to the Board for action. This is important because Mr. Lewey told me that Major Huntzinger should have requested, in

1960, that ABCMR retain him on active duty which would have given the Board the opportunity to investigate his non-retention. Consequently, it appears that Major Huntzinger properly submitted a timely application, in 1960, for appropriate relief. If, as Mr. Lewey indicated, the ABCMR would have conducted the necessary inquiry in 1960, his illegal relief from active duty would have been discovered at that time. However, Major Huntzinger should not be prejudiced by the improper failure of the U.S. Army to forward his ABCMR application for proper adjudication. Further, since this is newly discovered evidence of illegal conduct by the Army which is submitted to the ABCMR by this letter, it is within the 3 year statute of limitations.

Again, with regard to the statute of limitations, it should be noted that Major Huntzinger is not an attorney and, at the time, believed in the integrity of his Commanders. However, his trust

appears to have been misplaced as the evidence of record reflects continued unfair and improper treatment by his Supervisors. As an example, after being relieved from active duty by the Active Duty Board, Major Huntzinger was denied readjustment pay for 7 years because the Army maintained that he voluntarily resigned from military service.(Inc.4).

Major Huntzinger did not know that Army Regulations were not followed until he recently received documents reflecting the various ilegal acts on the part of the U.S. Army in relieving him from active duty in 1960 which are reflected in my recent correspondence with the Board on behalf of Major Huntzinger. If he would have had this information previously, he certainly would have submitted it to the Board for corrective action. Furthermore, the Board cannot expect a soldier to vicariously know all the Regulations applicable to his situation and, therefore, he must prepare his case after obtaining the relevant

evidence. The IG Report of Investigation was withheld from Major Huntzinger as he was never furnished a copy of this completed Report as required by paragraph 6, IBIG 4 (Inc. 5), and AR 640-98 (Inc. 6). Paragraph 5 of this Regulation is not applicable because the IG Report did not result in elimination or disciplinary action as these situations require a separate hearing.

The ABCMR recognized these circumstances by allowing Major Huntzinger to withdraw his ABCMR application without prejudice on 7 June 1983. (Inc.7) This was after a conference with Mr. Donald C. Lewey of your staff, at which time Mr. Lewey consented to the withdrawal after mentioning for the first time to Major Huntzinger that there may have been some "wrongful and fraudulent" action in his relief from active duty in 1960. This was the first time that anyone had mentioned such improprieties to Major Huntzinger which, again, was within the statute of limitations.

In summary, I believe that the totality of the circumstances should be viewed in determining whether Major Huntzinger has attempted to correct the injustices perpetrated again him. Such an evaluation reflects his determined effort to correct his records and receive appropriate relief which should not be circumvented by an arbitrary application of the statute of limitations. Further, because of the complicated nature of the facts of this case, Major Huntzinger requests a personal appearance before the Board as soon as possible.

Sincerely,

Bruce E. Stevenson

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November 1, 1984

Secretary, Army Board for
Correction of Military Records
Department of the Army
Washington, D.C. 20310

Re: ABCMR Application
Irvin J. Huntzinger

Dear Sir:

In reply to the DAJA-ALP opinion, dated 3 August 1984, the following comments are submitted:

1. This opinion continues to refer to the legal errors raised in the 9 September 1983 letter in this case, but does not comment on the January 27, 1984 letter submitted by Major Huntzinger which specifically details additional errors committed by the U.S. Army in improperly relieving him from active duty. Consequently, it appears that the additional evidence submitted by Major Huntzinger <u>was</u> erroneously <u>not</u> considered in the JAG opinion. Further rebuttal is submitted as follows along with the Army

Regulations in effect at the time of Major Huntzinger's relief from active duty:

a. JAG opinion, Paragraph 2g:

Change 4 to AR 135-173, which is dated 22 July 1960 specifically implemented two earlier DA messages in January, 1960 (as reflected in the change), and the Letter of Instruction to the Board (not available) which required referral of the screening recommendation to the officer considered for elimination and to submit names to the Active Duty Board (ADB) without recommendation. (TAB S). This referral was extremely important as it gave the officer the opportunity to rebut any adverse material, thus, meeting the requirement for administrative due process. Consequently, the failure to accord such due process to Major Huntzinger by not allowing him rebuttal rights and also the failure of the U.S. Army to meet the requirements of AR 640-98 for filing adverse material in his records prior to being considered by the

ADB voids material in his records prior to being considered by the ADB voids Major Huntzinger's relief from active duty. Furthermore, Major Huntzinger could have submitted the favorable comments from his current command at Fort Dix, New Jersey which then could have casued his retention on active duty. This error was further compounded when these favorable comments from Fort Dix, N.J. were never given to the Active Duty Board at the time of reconsideration on 7 June 1960, especially in view of the letter of Instruction to the Board which indicates that the greatest weight should be given to the most recent years of service. (See my letter of January 27, 1984 which reflects errors in the Active Duty Board's failure to receive all the current personnel information submitted by Major Huntzinger). Again, when the Active Duty Board on June 6, 1960 was requested to reconsider Major Huntzinger's case, Paragraph 50, AR 135-173 was violated when OPMG recommended

that he be released from Active Duty. (Tab CC).

Further, the IG investigation was defective as it was completed by an individual who was obviously prejudiced against Major Huntzinger (see comment to this effect by DAIG [Tab E; Paragraph 3, th IND] and Major Huntzinger was never given the opportunity to submit rebuttal material to the IG Report of Investigation nor could he appeal it as the Report was never referred to him as required by Paragraphs 28d and 32, AR 20-1, 16 July 1958 which was in effect. (TAB 9).

This Regulation also states that no adverse action is to be taken against a person who registers a complaint, but was obviously violated to the detriment of Major Huntzinger. Specifically, Major Huntzinger was never afforded the opportunity to rebut or appeal the IG recommendation that Major Huntzinger be relieved from active duty as required by AR 20-1 (TAB 9) which would have allowed

him to demonstrate that it was biased, incomplete and defective and, therefore, should not be considered. Certainly, if the recommendation for relief from active duty was to be implemented, then he should have been told these facts as mere unsubstantiated allegations relating to good faith comments made by Major Huntzinger were not sufficient to appraise him of his contemplated relief from active duty. Furthermore, most of these allegations were vague and non-specific as to person, time or place and were impossible to refute absent the calling of his additional witnesses and a polygraph examination which requests were denied by LTC Freeman, the Fort Hood IG whom the Department of the Army Inspector General described as a biased officer. (TAB e, above.)

The IG Report of Investigation should never have been submitted to the Active Duty Board, in any event, as Par 4, AR 640-98, 14 November 1955, as well as AR 135-173, states that no adverse

matter "will be made a part of the Individual's record without his knowledge and an opportunity being afforded him either to make a written statement in reply to the adverse information..." (Tab 10). While certain allegations of various soldiers were furnished to him, he wa never furnished with any conclusions of the Investigating Officer that he be relieved from active duty. Further, the IG investigator which was investigating complaints which he was told to make by his superior, Colonel James F. Delaney, at Fort Hood, Texas, was misdirected against Major Huntzinger and, therefore, beyond the scope of IG's authority. If the IG wanted toinvesti-gate Major Huntzinger, a new investigation should have been started and he would then have been given a chance to clear himself and afforded the protections of AR 15-6 as this Regulation specifically covers investigations of the efficiency and character of individuals.

In this connection, it should be

noted that the IG Report contains a statement that it contains "no prejudical information". (Tab T). This statement is false and obviously reflects vindictive action on the part of his superiors to allow adverse information to be made a part of his official records without complying with AR 640-98 and, therefore, improperly allowing it to be considered by the Active Duty Board. It is the height of absurdity to conclude that the Report was not prejudicial.

Another violation of Paragraph 50, AR 135-173 is the improper recommendation of the Provost Marshal General (PMG) that Major Huntzinger should be relieved from active duty which only emphasized alleged deficiencies without affording Major Huntzinger the opportunity to rebut them or to submit evidence in his behalf. Certainly, the Active Duty Board was adversely affected by these improper comments including the recommendation for relief from active duty which violated para 50, AR 135-173, Change 4, which

change was in effect by DA messages in January 1960 (see bottom of Regulation.)

b. JAG opinion, Paras a-f:

The main purpose of requiring the referral of any recommendation for relief from active duty to the officer concerned is to afford all parties the opportunity to present all facts to the ADB because of the serious nature of the contemplated action. If this is not accomplished, the officer is denied military due process which then voids any adverse action because he had no knowledge of the material considered by the ADB. The Department of the Army is required to follow its own Regulations and due process cannot be circumvented by having a JAG opinion substituted for the Active Duty Board's considered judgment of all the pertinent evidence in the case, to include Major Huntzinger's performances of duty at Fort Dix, New Jersey which was available but not given to the Active Duty Board at any time. See my 27 January 1984 letter, containing

irrebutable evidence that these reasonable recommendations for his retention on active duty were not given to the ADB upon reconsideration.

In conclusion, it appears that Regulations have been disected, evaluated and quoted by all parties concerned, but the bottom line is whether Major Huntzinger has been fairly treated by the United States Army in relieving him from active duty. An objective evaluation of the evidence reflects that Lt. Huntzinger was asked by the Deputy Post Commander at Fort Hood, Texas to detail his observations concerning Military Police problems at the installation. These comments were requested because of another on-going investigation and later General Court Martial of LTC Jack Canon, Post Provost Marshal at Fort Hood, Texas which involved gross irregularities and jealousies between various factions at Fort Hood, Texas.

Because of Lt. Huntzinger's candor and good faith comments, he was crucified

by an IG Investigation which was initially requested only to evaluate the comments of Lt. Huntzinger. However, this investigation then improperly focused on Major Huntzinger and the IG exceeded its authority by ten evaluating Lt. Huntzinger's fitness to remain on active duty. When Lt. Huntziner was asked to submit a statement concerning vague and unsubstantiated allegations against him, he was not furnished any witnesses' statements nor were supporting witnesses called as requested and he was refused a polygraph test.

The prejudiced Report of Investigation ~~was~~ then forwarded to the Department of the Army with a recommendation for his elimination from the service. If this recommendation was followed, then Lt. Huntzinger would be entitled to an Administrative Board and full hearing concerning his fitness to remain on active duty. (See AR 15-6). Instead, surrepticious action was taken to eliminate him by using the subterfuge

of annual screening to release him from active duty. By this time, it is obvious that the OPMG wanted to eliminate Lt. Huntzinger at all cost. Consequently, he was not given the opportunity to comment on any recommendation for removal from active duty as required by Army Regulations and the prejudiced IG investigation, which was never refered to him for rebuttal, was improperly given to the Active Duty Board. Further, Lt. Huntzinger's favorable recommendations from Fort Dix, New Jersey, which may have caused the Board to allow him to remain on active duty, was illegally and deliberately withheld from the Board during reconsideration on 7 June 1960.

It is also worthy to note that, then Captain Huntzinger, was recalled to active duty in 1966 and received outstanding effiiency reports. Again, he was recalled to active duty in 1967 when he attended the Quartermaster Advance Course. Again, in 1968, he filled a LTC position on active duty with Fourth USA

Headquarters, Fort Sam Houston, Texas, and, subsequently, was retired for physical disability in 1970. Obviously, Major Huntzinger would not have been recalled to active duty if he was not an outstanding officer.

Accordingly, it is submitted that if all the evidence is examined objectively, using the common experience of mankind including all inferences, and avoiding unsubstantiated and imporper comments, the facts demonstrate a concerted effort on the part of the OPMG to eliminate Major Huntzinger from active duty in any way possible which included deliberate and intentional disregard of his rights, Army regula- tions, and military due process. Consequently, it is requested that the Army Board for Correction of Military Records grant the relief requested as the Active Duty Board had no jurisdiction to release Major Huntzinger from active duty because of the absence of due process and other considerations. Therefore, his records should be changed

to void his relief from active duty. Further, deliberate errors by the Department of the Army to conceal the facts from Jaor Huntzinger concerning the actual reasons for his relief from active duty (to include his repeated request for the IG investigation of LTC Cannon) and in not submitting his current efficiency reports from Fort Dix, New Jersey, upon reconsideration nor forwarding his case to the ABCMR as requested in his 19 March 1960 letter to the Department of the Army resulted in denial of military due process and other prejudicial circumstances causing any statute of limitations and laches to be inapplicable. (Tab U).

Also, it is specifically requested that this letter as well as my letters of September 9, 1983; January 13, 1984; January 27, 1984; and March 30, 1984 be read by the members of the Board as they constitute official amendments and additions to all requests for relief by major Huntzinger presented to the ABCMR.

As mentioned previously, because of the complicated nature of this case, a personal appearnance before the Board is again requested in order to logically reconstruct the events which caused Major Huntzinger to be improperly relieved from active duty.

Sincerely,

Bruce E. Stevenson

BRUCE E. STEVENSON
Attorney at Law
424 South Washington Street
Alexandria, VA 22314

January 2, 1985

Secretary, Army Board for
Correction of Military Records
Washington, D.C. 20310

Dear Sir:

In regard to the Statute of Limitations and laches and the JAG opinion regarding these matters, the following information is furnished.:

In his continuing request for justice, Major Huntzinger was constantly told that his efficiency reports caused him to be relieved from active duty and that is the reason he emphasized their elimination. However, contrary to the JAG opinion that the discovery of the error in allowing the Active Duty Board (ADB) to consider the IG Report and other pertinent matters was not within the Statute of Limitations, the enclosed letter to the ABCMR requesting this specific information in 1979 is submitted for your consideration. (Enc 11). This

request was then sent to General Services Administration who identified the documents which were later sent to Major Huntzinger. (Enc. 12) Prior to that time, Major Huntzinger did not have the IG Investigation or pertinent documents as reflected in the 14 June 1979 letter from RCAP. (Enc. 22)

While waiting for the additional information, Major Huntzinger again filed another application before the ABCMR, dated 30 July 1979, pursuant to the letter he received from BG Robert S. Young (Enc. 13). In this application, Major Huntzinger specifically referred to the IG Report of Investigation as causing his relief from active duty. (Enc. 14) This was filed within the three year Statute of Limitations. On 28 May 1980, ABCMR denied this application. (Enc.15)

Thereafter, on 6 November 1981, Major Huntzinger and Mr. Watts P. Tyler of your office had a conference wherein it was determined that Major Huntzinger could resubmit his application for

consideration by the ABCMR, which he did by letter, dated 7 December 1981 (Enc. 16). This application was denied by the ABCMR on 29 July 1982 (Encl 17).

Major Huntzinger then wrote a letter to the ABCMR, dated 18 December 1982, expressing his dissatisfaction with the decision and again reflecting his contention that he should not have been relieved from active duty. (Enc. 18)

On 24 March 1983, Major Huntzinger filed another application before the ABCMR again contesting his improper relief from active duty (Enc. 19), but after a conference with Mr. Donald L. Lewey on 7 June 1983 concerning his imporper relief from active duty, he was allowed to withdraw his application, without prejudice, in order to obtain the services of an attorney and present further evidence (Enc. 20). Subsequently, an additional application was filed before the ABCMR which was merely an addendum to the 1979 application which is now pending before the ABCMR and filed

within the Statute of Limitations.

In conclusion, it is obvious that throughout this entire period of time, as well as previously, Major Huntzinger has endeavored to remain on active duty. He is not an attorney, but has tried to correct this obvious injustice which should have been apparent to the ABCMR. Every time he obtained additional information, he filed an application before the ABCMR.

Consequently, his case should not be denied on the basis of laches or the Statute of Limitations. Further, by the ABCMR accepting his numerous applications and ruling on these issues, the ABCMR waived any such issues or defects as reflected in the case of Kaiser v. Secretary of the Navy (Enc. 21); and with regard to the merits of this case, Weiss v. U.S. specifically states that "documents which are sent to a selection board for its consideration must be substantially complete and must fairly portray the officer's record." (Enc. 21)

However, this was not done in the instant case. Obviously, justice and fairness, which is the mandate of the Board, is on the side of Major Huntzinger.

Consequently, it is requested that this case be considered by the ABCMR as soon as possible and all our letters and briefs be personally read by the members before reaching a decision.

Sincerely,

Bruce E. Stevenson

VII

DEPARTMENT OF THE ARMY
Office of the Adjutant General
Washington, D.C. 20310

March 20, 1985

Personnel Services Directorate PSA-A
Huntzinger, Irvin J. 171 26 5891

Major Irvin J. Huntzinger
United States Army Retired
Route 2, Box 1190
Stafford, VA 22554

Dear Major Huntzinger:

I have been asked by the Army Board for Correction of Military Records to reply to your request for correction of your Army records.

Your application has been denied under the administrative rules given by the Secretary of the Army for guidance of the Army Board for Correction of Military Records. These rules state the Board may deny an application if it determines that not enough proof was presented to show that an error or injustice exists in the record. A copy of the Memorandum of Consideration stating the Board's reasons for denial is enclosed.

In the absence of new evidence showing that an error or injustice exists, further consideration by the Board is not possible.

Sincerely,

Donald J. Delandro
Brigadier General,
U.S. Army

The Adjutant General

Enclosure

27 March 1985
Refer to:
Personnel Services Directorate PSA-A
HUNTZINGER, Irvin J. 171 26 5891
1/3/4.14/3

Brigadier General Donald J. Delandro,
U.S. Army
The Adjutant General
Department of the Army
Washington, D.C. 20310

Dear General Delandro:

This will acknowledge your letter of March 20, 1985 transmitting ABCMR response to my Application for Correction of Military Records, dtd 27 February 1985, Docket No. AC 83-10121, Index Number 113.00, application revised dtd 9 SEP 1983.

Please de advised that the Examiners report contains error of fact of record, which I would be most happy to discuss prior to continuing with litigation in the United States Court of Claims, Washington, DC in endeavorance to negotiate a fair settlement after a 25-year drawn out period. The most important fact is that I was never advised of the recommendation of the Inspector General Investigation conducted at Fort Hood,

Texas; and, it was the Department of the Army Inspector General's Review Staff opinion that the Investigating Officer was, appeared.."point out the biased language of the IG on whom he must depend for a fair and objective investigation. Such action would, in my opinion, reflect unfavorably on the IG system generally, and all who had a part in handling this matter specifically." I was not aware of the IG recommendation of elimination action nor the foregoing comments until discovery pursuant FOIA in 1979-80 time frame. (See Tab "E" basic application). The report was specifically withheld from my knowledge, and DA directed return of the report to Ft Hood and only interrogatories were submitted to me at Fort Dix NJ for rebuttal which I thought had been accomplished successfully as did apparently the Command 1 USA and Fort Dix or they certainly would not have recommended strongly a united recommendation for retention supported with numerous letter of recommendation(s).

When, as pointed out by counsel, I was separated 24 June 1960 I was advised it was for "annual screening" NOT result of any IG report. As concerns due process it is matter of record that I appealed the Ft Hood IG conducting subject investigation on two separate conditions and no action was taken, though it is apparent that DA IG recognized the conditions that existed at Fort Hood. There was a second investigation conducted at Fort Hood concerning the MP Officer which the examiner neglected to include and dwelt only on the case of a "LTC." Assuming it was LTC Jack Y. Canon, the Provost Marshal who was court martialed, later acquitted. MG Boatner also dwelled on this point.

Further, the examiner states, (page 5) "In this case the Board considers that the date of discovery of the alleged error or injustice should have been the date of the applicant's REFRAD: 24 June 60. The record explicity states, and no evidence to the contrary, that the

results of the IG investigation, findings, conclusions, recommendations were withheld from my knowledge. In fact, it took Department of the Army Adjutant General seven (7) years to clarify the record in determination if I was voluntary or involuntary terminated. At no time was the IG referenced during this period. In addition, no consideration is apparent for prior service or subsequent to Ft Hood "chaos" and fact that subject letter was specifically written at request of the Commander to the Secretary of the Army based on my notes of record turned over to TIGO, D/A, as stated in testimony before the DA-TIGO, in connection with the IG Investigation of LTC Cannon and MP Activity, Ft. Hood.

In summary, I state again, as previously stated in sworn statment furnished the ABCMR I had no knowledge of the conclusions or recommendation of the IG Fort Hood prior to 1979, discovered pursuant FOIA. The application of 1960 requested retention on active duty,

"restoration" would not have been applicable at that point in time, and due to controversy between DA Agencies it would not have been possible until DA determined how and for what reason I was in effect terminated in 1967. The administrative procedure, then in effect, was followed by including application with request for retention through command, in my opinion. Subject request further contained a request for "show cause board" and counsel be furnished to defend me. No Action by TAGO.

With reference to paragraph 5 of Examiner's report, in our opinion, evidence to the contrary was furnished, and this must obviously be resolved by the courts, if the Army is not amendable to resolve through negotiations. I think I have justified, significantly, evidence to the contrary of the ABCMRs point of discussions. Promotion to Colonel was considered - punitive damages.

General Delandro, I would appreciate receiving a copy of "TAG Office message

082147Z Jun 60. It was annotated to show that the DAADB considered all of the rebuttal material submitted by the applicant as well as (favorable) endorsements thereto. Again the record is documented to the contrary and copy of subject message received FOIA from General Young, USAP&AC in 1979 does not bear such an annotation. (See page 4-DISCUSSION, 2d para fr bottom).

Please advise if the Army would prefer to further consider this case on the merits in conference, with my Counsel, or shall we proceed with litigation.

Sincerely,

I.J. HUNTZINGER, Sr.
Major, U.S. Army Retired

"EXTRACT" from

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Articles in Addition to, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Legislatures of the Several States Pursuant to the Fifth Article of the Original Constitution

Amendment I

Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

public use, without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1.All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

HEADQUARTERS
INDOCTRINATION DIVISION
AIR TRAINING COMMAND
LACKLAND AIR BASE
San Antonio Texas

SPECIAL ORDERS 30 August 1947
NUMBER 194 EXTRACT

19. Pursuant to AR 345-1 the name of Pvt Harvey W Huntzinger RA 13248711 AFTR C Sq C-1 3543 AAF Base Unit this sta is changed to Pvt Irvin J Huntzinger RA13248711. All records this sta will be changed accordingly.

BY COMMAND OF MAJOR GENERAL DOUGLAS:

OFFICIAL:

F.W. OTT
COL AC
Chief of Staff

S/ROYAL A. PUTMAN
T/ROYAL A. PUTMAN
Capt AC
Actg Asst Adj Gen

"CERTIFIED TRUE COPY"

s/t WILLIAM A. GILL
CAPTAIN US AF

MFR: This doc will clear the air ref enl age 14. Waiver was req thru channels and approv TAGO Atch'd order chg'd all records.
Auth remain in svc w/o objection of parents, w/agreement attend night school completed.

IJH

APX P-222

AKPSIAC 201-HUNTZINGER, IRVIN J. (O)
01 923 750(13 Apr 57) 3d Ind
SUBJECT: Request for Transfer of Branch

OFFICE OF THE COMMANDANT, U.S. ARMY ARTILLERY AND GUIDED MISSILE SCHOOL, Fort Sill, Oklahoma, 16 April 1957

TO: The Adjutant General, Department of the Army, Washington 25, D.C. ATTN: AGPR

1. Stongly recommend approval.

2. This officer possesses outstanding qualities of leadership. His value to the Artillery is less than it would be in the Military Police Corps due to a deficiency in mathematical ability. This officer is clearly outstanding in other military capabilities.

3. This action is not in contravention of AR 600-31.

FOR THE COMMANDANT:

s/t JOHN W. DEAN, JR.
Colonel, Artillery
Secretary

*****EXTRACT*********

Part I - For Army Officer Students
Attending Service Schools

FROM:
US Army Artillery
and Guided Missile
Sch., Ft Sill, OK

The Adjutant General
Dept of the Army
Washington 25, DC
Attn: ACPI-F

Huntzinger, Irvin J.

6. Course Pursued
Field Artillery Officer Basic Crse #14-57

8. Did Officer Successfully Complete the Course? X (NO) Reason:
Relieved per instructions from Dept of Army.

REMARKS:
Student was relieved from FAOBC #14-57, in accordance with instructions from Department of Army, effective 15 April 1957.

Sutdent is suitable for further schooling. Insufficient observation to make recommendation for general staff or high command.

Fr 26 Jan 57 to 14 Feb 57, ...

APR 23, 1957

s/t JOHN W. DEAN, JR,. Col, Arty
Secretary

DA Form 1059

DISPOSITION FORM

***** EXTRACT *******

TO: Chief, Asgmt Sec FROM: OPMG, US Army

DATE: 7 May 57 Comment No. 62819

XX-Approved for transfer effective 1 July 1957 as exception to CMD policy #30-9

FOR THE PROVOST MARSHAL GENERAL:

s/t RAYMOND R. REAGAN
Lt Colonel, MPC
Chief, Personnel Div

DD Form 96

Fort Sill, Oklahoma

17 April 1957

SUBJECT: Relief and Reassignment of Student

1. In accordance with AR 150-5 subparagraph 21b(a)

statement of relief and reassignment of
2nd Lt. Irvin J. Huntzinger, 01923750
TDPFO 2st Off Stn Btry, Ft Sill, OK,
Class #14, ***, Course: Fld Arty Off. Basic.

Relief is effective 15 Apr 57 for the following reason(s):

XX - In accordance with DA instructions

3. Student is recommended for further instruction.

****

Off assigned US Army Staff & Faculity..****

FITNESS REPORT

Huntzinger, Irvin J. Jr. ***

FR: 15 Apr 57 TO: 14 Oct 57 ****

Officer in Charge - Security Guard Detachment

******

SEC III - DESCRIP of RATED OFFICER

Eager, ambitious, energetic young officer who is courteous, industrious and strives to please. Rather inexperienced, tends to act before thoroughly analyzing a given problem. However, he learns from his mistakes and is rapidly developing into an outstanding officer. Possesses drive and enthusiasm; willingy accepts responsibility. He has a pleasing personality; friendly manner; excellent military bearing. An officer of excellent potential and genuine regard for the Army and its traditions. He is now acting as National Junior Vice President of the Reserve Officers Association. I know of no physical limitation which would preclude performance of duties required by his grade and branch in time of war.

An extremely energetic officer who has a tendency to act on the spur of the moment before the problem has been thoroughly analyzed. Highly motivated and ambitious, he learns by his own mistakes rather than profiting by the experience of others. He is courteous and firendly, good military bearing, is loyal to both superiors and subordinates. This young officer should develop with experience.

Rating officer:
s/t Clifford C. Hines, Col ****

Endorsing officer:
s/t James P Smith, Col ******

Reviewing officer:
James C Holley, Col. ******

RESERVE OFFICER ASSOCIATION
OF THE UNITED STATES
National Headquarters
2517 Connecticut Ave. NW
Washington, DC
19 May 1958

EXTRACT***

1st Lieutenant I.J. Huntzinger, USAR
720 Military Police Battalion
Fort Hood, Texas

Dear Jim:

Is is always a pleasure to write to one of our great Americans and since I categorize you in this class, this morning I am in fine spirit realizing that once again I have an opportunity to write not only to a world traveler but a distinguished vice president of our Association.

I am enclosing a copy of the Army Section Meeting agenda for Atlantic City and you will note that you are a member of the panel which will be operating on Wednesday, 25 June. I suggest you give considerable thought to the subject "Number One Problems As I See Them" inasmuch as you are participating with some high-powered individuals who will be most anxious to highlight their respective subjects. Knowing you as I do, I am sure that your contribution will lend much to the success of the occasion.

* *

Sincerely,

s/t M. H. Manchester
Deputy Exec. Director

DEPARTMENT OF THE ARMY
Office of the Provost Marshal General
Washington 25, D.C.

JUN 11,1958

Second Lieutenant Irvin J. Huntzinger
First Provisional Military Police Company
720th Military Police Battalion
Fort Hood, Texas

Dear Lieutenant Huntzinger:

Your last efficiency report for the period 6 January to 30 March 1958 has been brought to my attention. It is far below that of previous reports. Realizing you are a young officer on active duty for a short period of time, I feel it my duty to try to guide you in the proper direction before it is too late.

This report (comments are attached) indicates to me a lack of maturity in that you became over-zealous and fell victim to dual loyalties such as to render you subject to criticism. It appears to me that you are confused as to your responsibilities in relation to your most important duty as an officer of the Army and that of your affiliation with the Reserve Officers Association which was the cause of action by your commanders.

The purpose of this letter is to assist you in bettering yourself as an officer for your next efficiency report must reflect improvement if you are to continue on active duty.

The relationship of officers on active duty in reference to the ROA has been laid down by carefully considered regulations. The active Army, of course, supports the Reserve Army but must do so in accordance with law. As I understand, an illustrative example is in using postage free mail for ROA activities. This, I understand, is prohibited by Federal statute, primarily because the ROA is a dues collecting association. Evidently, your commanders have tried, without success, to convince you of the respective obligations. I suggest you

seek further guidance on this matter from your present commanders or other mature officers in whom you have confidence. Or better, considering your age and this report you might do well to put all your energy in obtaining a better record.

Sincerely,

s/t HAYDON L. BOATNER
Major General, USA
The Provost Marshal General

1 Incl
a/s

* * * * * * * * * * *

"1-30 b(1) IG records will not be used as the basis for adverse action against individuals by directing authorities or commanders except when specifically authorized by TIG, the VCSA, or the CSA."..; and,

"(2) When an IG record is used as the basis for action, the individual concerned will become entitled to additional due process rights that will breach the confidentiality of witnesses and IGs. When an IG record is used, the minimum amount of evidence necessary from the record will be used..."

"(3) IG records will not be used as the basis for actions by the command under the UCMJ..without approval of TIG or CSA. In all such cases, coordination will be made with Hq DA...after consultation with the appropriate command or staff Judge Advocate...."

"(5) IG records will not be made available to individuals or their counsel to be used in administrative and military justice actions or the appeal of efficiency reports as an official use within DA."....

EXTRACT -Uniform Code of Military Justice

* * * * * * * * * * * * *

21. Classification of Reports. If the report of investigation contains defense information, it must be classified in accordance with the provisions of AR 380-5. Reports of investigation that do not contain defense information must be safeguarded because they are privileged. See Manual for Courts-Martial 1951, Para 151c; AR 20-1; and AR 345-15. (See APX P-164, Rules of evidence)

DEPARTMENT OF THE ARMY TECHNICAL BULLETIN
INSPECTOR GENERAL INVESTIGATION TB IG 4
COMPLAINT GUIDE
EXTRACT * * * * * * * * * 16 July 1958

16. Informing Persons of Prejudical Matters

... he must before completing his report of investigation, so inform the person by letter, telephone, or telegram and give him an opportunity to submit further statements or to request the interrogation of witnesses. See AR 640-98.

EXTRACT "USMJ"

APPENDIX 3

* * * * * * * * * * *

10 U.S.C. 1552

§1552. Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. ...

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representacive files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

* * * * * * * * * * * *

Law Offices of
Crawford and Harris
405 East Avenue D
P.O. Box 607
Killeen, Texas

January 26, 1959

Commanding General
Fort Hood, Texas

Dear Sir:

Transmitted herewith is a documented statement which has been prepared in considerable detail and at his own expense by our client, 1st Lt. Irvin J. Huntzinger, Headquarters Detachment, 720th Military Police Battalion. It is intended for your information and any action which you may deem appropriate.

In essence, it seems apparent that Lt. Huntzinger has been the victim of a conspiracy existing within his own unit. Although this conclusion is shocking in itself, we assure you that it has not been developed in haste; the evidence to support it is ample.

For example, Lt. Huntzinger has been accused of perjury and has suffered damage as a result of the accusation, but he has never been permitted a hearing to

determine the truth of the allegation. He further has been victimized by defamatory statements contained in efficiency reports, and has been denied fair and impartial investigation into circumstances surrounding the rendition of such reports.

Lt. Hunzinger's tour of duty with his current unit has been characterized by strife and confusion within the organization, and the result has been deterioration of morale stemming from petty jealousies and malicious gossip.

At the behest of our client, these matters are invited to your attention because, to our certain knowledge, your known attitude has demonstrated beyond a doubt that such discrepancies within your command are given short shrift wherever recognized and evaluated.

Very truly yours,
CRAWFORD AND HARRIS
By: Robert O. Harris Jr.

FOR OFFICIAL USE ONLY

UNIFORM CODE OF MILITARY JUSTICE

"EXTRACT" from APPENDIX 2 Art 140, $ 940

§938. Art. 138. Complaints of wrongs

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

§939. Art. 139. Redress of injuries to property

(a) Whenever complaint is made to any

commanding officer that willful damage has been done to the property of any person or that his/property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive despositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.

******

Testimony DA-IG 30 Jan 59.
Connection Canon Case.

****

Q Is there anything else that you could add to this situation out there to help us clarify it?

A No, sir, I think I have stated just about everything that has transpired in my letter there to the Deputy Post Commander at Fort Hood, which is rather lengthy, sir.

Q In other words, all the material that you have presented here you would be willing to swear to under oath?

A Yes, sir.

Q This letter on top from Crawford and Harris is dated 26 January?

A Yes, sir.

****

A ... I gave the first several pages to the Deputy Post Commander out there and it got so involved and his secretary being tied up, I didn't want to impose on them and I told them I would have it typed, and I found this girl who could take dictation through Mr. Harris' office.

****

PMGT 201-HUNTZINGER, Irvin J.
01 923 750 (13 Apr 60)
SuBJECT: Request for Branch Transfer

TO: Chief, Army Res Br, TAGO

FROM: HQ, DA, OPMG
DATE: 22 Apr 60

COMMENT No. 5
Major Israel - 62819

Lieutenant Huntzinger's letter of 19 March 1960 (Tab A), requested retention on active duty and also contested the validity of several efficiency reports. This letter has been referred to the TAGO Efficiency Report Section to determine the validity of the efficiency reports in question. Final action on Lieutenant Huntzinger's letter requesting retention on active duty is being held in abevance until the correctness of the questioned efficiency reports is determined.

FOR THE PROVOST MARSHAL GENERAL:

MORRIS J. LUCREE, Colonel, MPC
Chief, Pers and Tng Division

DEPARTMENT OF THE ARMY
Board for Correction of Military Records
Washington, D.C. 20310-1803

22 Jul 1985

SFMR
HUNTZINGER, IRVIN J., SR.
171-26-5891

Major Irvin J. Huntzinger, Sr., Retired
18 Tree Haven Lane
Stafford, VA 22554-99251

Dear Major Huntzinger:

A thorough review of your military records and the retained records of this office by the staff of the Board for Correction of Military Records, failed to find the documents you are seeking. We understand that you have been advised that a similar search for these records by the Reserve Components Personnel and Administration center was likewise unsuccessful.

Sincerely,

Karl Bielenberg
Executive Secretary

APX P-242

DEPARTMENT OF THE ARMY
Office of the Adjutant General
U.S. Army Reserve Components Personnel
and Administration Center

June 3, 1986

Reply to
Attention of:
Personnel Services Directorate PSF
Huntzinger, Irwin J. 171 26 5891
2/17/11.52/18

Dear Major Huntzinger:

****

I have searched your record for a DF from OPMG dated March 31, 1960; a comment from ADB to OPMG dated April 1, 1060 and a letter dated April 14, 1960. None of these documents are a matter of record in your military personnel files.

****

Attached is an Efficiency Report ("Not Rated" period) ending January 5, 1958. The OER from Fort Dix, New Jersey at the termination of our active duty in June of 1960 is not a matter of record.

****

Sincerely,

James H. Baynham
Freedom of Information
Privacy Act Officer

APX P-243

DISPOSITION FORM

File No. IG 333.5 Huntzinger, Irvin J.

Subject: Efficiency Reports

To: TAG, PRB Date: 13 May 1960

Attn: Chief, Effcy Rpt Sec Comment No. 1

Lt Col Clarke/74007/fl

1. References:

a. Undated ltr, Hqtrs, Ft Hood, TX file AKPHO-CG260(RP)JA subject: "Investigation of Officer Efficiency Reports" (letter is signed by Wm. S. Biddle, Major General, USA, Commanding, to be found in TAGO 201 file of Lt. Huntzinger).

b. Report of Investigation dated 18 November 1959, Headquarters, Fort Hood, Texas, subject: "Report of Investigation Concerning Allegations by 1st Lt Irvin J Huntzinger" addressed to the Secretary of the Army, dated 24 January 1959 (Incl 1.)

c. Letter, Headquarters, Department of the Army, Office of the Inspector General, subject: "Complaint of Lt Huntzinger re: Efficiency," dated 31 March 1960, and 1st Indorsement thereto with 5 inclosures (Inc. 2).

d. Memo For Record, dated 091632 May 60 (Incl 3).

2. In reference a, General Biddle forwarded a then-current efficiency report for the period 1 November 1958 - 26 January 1959, but asked that it, and a previous report (for the period 27 March 1958 - 30 October 1958) not be evaluated pending outcome of a report of investigation then in progress. Reference b is the completed report of investigation referred to by General Biddle which recommended that the efficiency reports in question remain a part of Lt Huntzinger's file. Consequently, it is recommended that, if practicable, reference a be removed from Lt. Huntzinger's file, and that the two efficiency reports in question be substituted therefor.

3. In the light of reference d above, this office concurs in the actions and recommendations found at paragraph 7, 1st Indorsement, reference c, above. Since

FOR OFFICIAL USE ONLY

Lt Col Dunstan was twice, and was the only indorser of Lt Huntzinger's efficiency report subsequent to the report in question, and therefore fully cognizant of Lt Huntzinger's past and near-present duty performance, it would seem appropriate that Lt Col Dunstan be required to "indorse" the report in question, after which the report would be "reviewed" in the normal manner (by Lt Col Wilfred Farrell) and would become a proper part of Lt Huntzinger's efficiency file.

4. For the record, it should be noted that Incl 2 (DA Form 67-4 24 September 1959) to Incl 2, above, consitutes the official, permanent efficiency report pertaining to Lt Huntzinger and its return, as requested, is accomplished herewith.

5. It is further recommended, upon completion of the actions outlined in paragraphs 2 and 3, above that Lt Huntzinger's case be reconsidered by the

~~Removal Selection Board~~* DAADB

in order to preclude possible reclama by Lt Huntzinger on the grounds that previous board action had not taken into consideration all aspects and facets of his case prior to direction of his separation.

* * * * * * * * * * * * *

6. It is requested that this office be informed of final action taken to serve as a basis for reply to Lt Huntzinger's complaint, and further the attached inclosure, 1 and 2, less DA Form 67-4 (Incl 2 to Incl 2) be returned to this office when they have served their purpose.

FOR THE INSPECTOR GENERAL:

s/t K.E. TILTON, Colonel, IG
Chief, Investigations Division

3 Incl

1. Rpt of Ivstigation dtd 18 Nov 59 (Copy)
2. Ltr Dtd 31 Mar 60 w/1 Ind & 5 Incl
3. Cy Memo For Record dtd 9 May 60 dtd 9 May 60

* This change was effected with the verbal concurrence of Lt Col Clarke, OTIG, in accordance with a telephone converation between Lt Col Clarke, OTIG, and Captain Vantine, OAB, TAGO (X72360), 6 Jun 60.

AGPS-FA 201 Huntzinger, Irvin J.
01 923 750 (13 May 60)
SUBJECT: Efficiency Reports

TO Chief, Pers Actions Sec, Pers & Tng Div, OPMG, DA
FROM TAG
DATE 3 Jun 60
COMMENT NR. 2 M. Garrett/73026/jow/BE677

1. Forwarded for appropriate action in connection with paragraph 5 and compliance with paragraph 6, Comment Nr 1.

****

3. General Biddle's letter will remain a part of Lt Huntzinger's file, with a memo for record thereon to show that the investigation was completed and that as a result, the efficiency reports for the periods 27 March 1958 to 30 October 1958 and 1 November 1958 to 26 January 1959 will remain a part of Lt Huntzinger's file.

FOR THE ADJUTANT GENERAL:

J.D. GALLAGHER, Lt Col, AGC
Chief, Effcy Rept Sec, PRB, TAGO

PMGT 201-HUNTZINGER, Irvin J., 01 923 750
(13 May 60)
SUBJECT: Efficiency Reports

To: President DA Active Duty BD
Room 1E 463, Pentagon
From: HQ, DA, OPMG
Date: Jun 6 1960 COMMENT No. 3
Capt Lee - 62819

1. In view of the change of the efficency report pertaining to First Lieutenant Irvin J. Huntzinger, 01 923 750, MPC, for the period 18 April 1959 to 27 September 1959, attached correspondence is forwarded for reconsideration.

2.The Military Police Corps Branch continues in its previous recommendation that Lt. Huntzinger should be released from active duty.

FOR THE PROVOST MARSHAL GENERAL:

HAROLD L. TAYLOR
Colonel, MPC
Deputy The Provost Marshal General

(APP 209)

AGBD-S

Chief, MPC Br, OAD
Room 1805 Main Navy Bldg
ATTN: Capt Lee

FROM DA Active Duty Bd
Room 1E 461
DATE 7 Jun 60 COMMENT No. 4
Capt Morsman/73281/gbw

The Department of the Army Active Duty Board reconsidered the records of First Lieutenant Irvin J. Huntzinger, 01923750, MPC, in view of the information contained in Comment 1. and a majority of the members concurring, revokes his indefinite service agreement.

FOR THE BOARD:

PHYLLIS J. MORSMAN, Captain, AGC
(App 209) Recorder

AGG-MP 201-HUNTZINGER, Irvin J. 7th Ind
01 923 750 (19 Mar 60)
SBJT:Request for Retention on Active Duty

HQ, DA, TAGO, Washington DC 8 June 1960

TO: Commanding General, First US Army,
Governors Island, New York, New York

1. The efficiency report for the period 1 November 1958 to 26 January 1959 has been accepted and made a part of 1st Lt Huntzinger's file. The efficiency report covering the period 18 April 1959 to 27 Sept 1959, indorsed by LTC H.V. Dunstan and reviewed by LTC Wilfred Farrell has been substituted for the report originally submitted for the period 18 April 1959 to 24 Sept 1959.

2. In view of the foregoing, the DAADB again reconsidered the records of 1st Lt Irvin J. Huntzinger, 01 923 750, MPC. However, the Board's initial decision that Lieutenant Huntzinger be relieved from active duty was sustained.

By order of Wilber M. Brucker, Secretary of the Army:

D.A. Vantine
Adjutant General

14 Incl
nc

MEMO FOR RECORD

Cy Lt. Huntzinger's ltr of 19 Mar w/6 Ind and 14 Incl att to green.

Cy of this ltr, inc, and incls filed in Rec Sec OPMG w/cy of DF to DA ADB dtd 31 Mar 60. DF (Cmt 1) from TIG to TAG, PRB, Eff Rept Sec, 13 May 60, Cmt 2 from TAG to OPMG, 3 Jun 60, Cmt 3 from OPMG, to DA ADB 6 Jun 60 and Cmt 4 from DA ADB to MPC dtd 7 Jun 60 att to green (copies)

(Underlining added for emphasis.)

DC LEE:emn:62819

P&T Div: PAS:8 Jun 60

KAAG-RO 27 June 1968
SBJT: Voluntary Active Duty for USAR Personnel to Augment Active Duty Support to the Army Reserve "EXTRACT" letter of Hq USA
****

d. Individuals whose records of past performance are marginal or substandard when compared to qualitative performance of individuals in the same grade and branch currently on active duty.

****

f. Members of The Ready Reserve who were removed for any reason, except for the convenience of the government, from units involuntarily ordered to active duty in accordance with message DA 859314, 11 April 1968 (Subject: Mobilization Order).

****

RCPC Huntzinger, Irvin J.
171-26-5891 (01 923 750)

10 Jun 1969

MEMO FOR RECORD

Basis for Action: DF, Cmt #1, dtd 26 Nov 69, fr ABCMR, request reconsideration of subj officer's application for correction of military records.

****

In 1969, because of new evidence submitted to this office to include a statement from General Boatner (see Incl *), this case was forwarded to a Standby Advisory Board on 26 June 1969. The Standby Adv Board who had available to it all real evidence concerning Captain Huntzinger's contention that the ERs should either be expunged or given no weight in the consideration. The Standby Bd that convened and adjourned on 6 August 1969, did not recommend Captain Huntzinger for promotion to major, USAR, under the 1968 criteria.

****

RCPC answered Senator Montoya stating that no further action could be taken by this office until such time as ABCMR rendered a decision which would allow the ERs to be expunged from the record. ABCMR agreed to reopen the case. On 4 Dec 69, RCPC rec'd corres fr ABCMR req infor as to the possibility of fwding officer's

files for reconsideration to a Standby Adv Bd as they believed that the Standby Adv Bd which had considered him before did not have all evidence available to it (see req fr ABCMR INCL 4).

****

No basis for reconsideration of this case at the present time and that there will be no basis for reconsideration unless the ABCMR directs that the two efficiency reports in question are to be expunged fr subj officer's efficiency file.

Significance of OPO Action: NONE

Coordination: LTC Douglas,
Chief, Promotion Div. USARCPC
Mr. Perry,
Admin Asst, Prm Div. USARCPC
Mrs. M. Dickerson,
Chief, Corres Br, Prm Div, USARCPC

H. Faye Smith
Corr Br. Prm Div/3939 11 Dec 69

MEMORANDUM FOR: ABCMR 10 JUNE 1969

NAME:HUNTZINGER, IRVIN J. SN: 01 923 750

In response to this Board's request for reconsideration of appl's case in light of sworn statement submitted by MG Boatner (Ret), who requested that his statement be considered, DESPER, on 4 Jun 69, stated, pertinently, that appl's case had been carefully reconsidered by the DESPER Sp Rev Bd in light of new evidence forwarded; that the Sp Rev Bd determined that the additional evidence submitted provided nothing upon which it could base a change to its original findings in the case; and that, therefore, it was still the opinion of that office, as previously expressed, that the 3 effcy repts in question should not be removed fr appl's official mil records. (See cy of attached DA Sp Rev Bd's case summary for further amplification, to include cy of MG Boatner's sworn statement).

****

b. that his request to cause removal of 2 of the 3 effcy repts concerned and to remain on act dy in 1960 received

Departmental consideration by the DA Act Dy Bd on two different occasions, and it was the considered judgment of the Bd and the USA in approving its findings and recommendations that he should be involuntarily relieved fr act dy;

****

d. that the sworn statement submitted now by MG Boatner appears to be in conflict with the recommendation he made concerning appl's relief fr act dy in Feb 60, when he agreed with the repts at that time; and that his sworn statement does not directly provide material evidence as to whether the repts rendered on the appl were or were not a fair evaluation of his performance of dy. (For the most part, his statement dwells on the activities and GCM of LTC Jack Cannon, who was PM of Ft Hood at the time the appl's effcy repts were rendered); and

e. that the opinions expressed by DESPER in May and Jun 1969 support denial of appl's request.

CONCUR: G Edwin Frayser E.E. Wilmeth

Examiner

AOMR 26 FEB 1970

Honorable Ralph W. Yarborough
United States Senate

Dear Senator Yarborough:

Further reference is made to your letters of 26 September, 8 Oct, and 11 November 1969 expressing interest in the case of Captain Irvin J. Huntzinger, USAR, 01 923 750, who requested reconsideration of the decision made by this Board on his application for correction of military records.

On 11 June 1969 it was the unanimous decision of the Board that there was insufficient evidence of probable material error or injustice to warrant a formal hearing in Captain Huntzinger's case, regarding removal of three efficiency reports rendered on him during the period 6 January 1958 - 26 January 1969 and his failure to be selected for promotion to major, USAR, by the Reserve

Selection Board which adjourned 4 November 1968. Therefore, his application was denied in accordance with the regulations governing the operation of the Board.

A thorough and sympathetic re-examination and review of all of the information and evidence submitted by Captain Huntzinger has been made in conjunction with the evidence of record. Based upon this review it has been determined that no basis has been submitted which would support changing the decision previously rendered by the Board in his case.

In its reviews the Board noted that Captain Huntzinger's requests in 1959 for the removal of the efficiency reports concerned were the subject of a thorough investigation by the Inspector General, Fort Hood, Texas; and that following Departmental review, it was concluded that the reports were valid and a true evaluation of his performance of duty during the period concerned. Further, it

was noted that following careful consideration on 15 May 1969 and reconsideration on 22 May 1969, the Department of the Army Special Review Board determined, in light of the new evidence submitted and the sworn statement rendered by Major General Hayden L. Boatner (USA Retired), that the additional evidence and statement provided no basis to justify withdrawal or altering of the efficiency reports concerned.

In consideration of the foregoing and in the absence of evidence of probable material error or injustice not previously considered, it would appear that the facts and circumstances are such that the prior determination in Captain Huntzinger's case must be sustained. These decisions were made only after a fair, complete, and impartial consideration of the entire matter.

You may be interested in knowing that Captain Huntzinger was selected for promotion to major, USAR, by the Reserve

Selection Board which adjourned 27 October 1969; and that announcement of his promotion to that grade, effective 12 July 1970, has been made.

Your interest and consideration in this case are appreciated and I am sorry the circumstances are such that my reply could not be more favorable.

Sincerely,
Raymond J. William
Executive Secretary
Board of Correction
of Military Records

DEPARTMENT OF THE ARMY
Office of the Inspector General
Washington, D.C. 20310

DAIG-ZXR 10 MAY 1983

MEMORANDUM FOR ARCHIVIST, PROGRAM COORDINATION STAFF, GSA

SUBJECT: Inspector General Records

EXCERPTS

... fulfill his responsibility as the confidential representative of his commander.

a. ... In order for an inspector general to service his commander effectively, he must be able to communicate frankly and fully without concern for public disclosure.

c. ... paragraph 3-200, AR 340-17.

FREDERICK W. TKACZUK
Chief, Records Release Office

UNIFORM CODE OF MILITARY JUSTICE

RULES OF EVIDENCE

"EXTRACT" from

§151. Privileged and Nonprivileged Communications

Para 151 c.

(3) Confidential and secret evidence. The Inspectors General of the various armed forces, and their assistants, are confidential agents of the military or executive departments concerned or of the military commander of whose staff they may be serving. Their investigations are privileged unless a different procedure is prescribed by the authority ordering the investigation. Reports of these investigations and their accompanying testimony and exhibits are likewise privileged and copies thereof need not be furnished to any person other than the authroity ordering the investigation or superior authority. However, when application is made to the authority ordering the investigation for permission to examine for use, or to use,

in a trial by court-martial or other military course of justice certain testimony, or an exhibit, accompanying the report of investigation, which testimony or exhibit may become material in the trial or course of justice, for example, to show an inconsistent statement of a witness, he should approve the application unless he is of the opinion that it would be contrary to public policy to divulge the information desired.

*****

TITLE IRVIN JAMES HUNTZINGER,
Plaintiff-Appellant
v.
THE UNITED STATES,
Defendant-Appellee

U.S. CLAIMS COURT JAN 10 1986
DOCKET NO. 317-85 C

TERM & DOCKET NO. 86-798

DATE	Proceedings & Orders
JAN 10 1986	Received certified list. Informal brief notices sent to parties. COUNSEL FOR THE APPELLANT. Irvin J Huntzinger, John S. Groat
APR 21 1986	Certificate of Interest filed by the Appellant Certificate of Interest filed by the Appellee
JAN 28 1986	1. Petitioner's motion for an extension of time, to and including Mar 2, 1986 to file a brief, filed (SD1/24-M) GRANTED: 2/4/86
MAR 6 1986	2. Appellant's motion for an extension of time, to & including 4/14/86, to file brief, filed (SD3/6-M ak to fxg GRANTED: 3/12/86 (3/13/86)(bam)
APR 14 1986	Brief/separate appendix for appellant, filed(SD-4/14-M) scg
APR 24 1986	3. Proof of service request from petitioner; in re briefs & appendices

MAY 22 1986	4. Appellee's motion for an extension of time (to and including June 26 1986) to file its brief, filed. (SD-5/22-M) (ejc) (5/27/86) GRANTED: 5/28/86. (ejc) (6/2/86)
JUN 26 1986	BRIEF FOR THE APPELLEE, filed(SD-6/26-M)(jb)
JUL 20 1986	REPLY BRIEF FOR THE APPELLANT,filed(SD-7/10-M)(jb)
SEP 3 1986	5.Ltr to counsel Graham & Groat re oral argument on Oct 8/M.
SEP 13 1986	This case has been reassigned to Panel H++ on 10/1
OCT 2 1986	6. Citation of additional authority for appellant was received.(jb)(Circulated to panel10/3/86).
OCT 8 1986	Argued.(Markey,CJ,Newman & Archer, JJ) 1c
OCT 20 1986	AFFIRMED. Archer, J. (U) ak
OCT 22 1986	7. Bill of costs against appellant,filed.(SD-10/22/86) (bam)ALLOWED$49.12(11/20/86
OCT 29 1986	8.Ltr from I.J.Huntzinger, appellant, requesting reconsideration of the decision in this appeal, received. (ejc) 10/30/86)
OCT 30 1986	9. Ltr to petitioner's counsel forwarding a copy of material received from actual petitioner. Informed attorney that Court is unable to refer the matters presented by the appellant, pro se. to the Court (bam)

NOV 3 1986	Ltr of 10/30/86 circulated to panel. (ak)
NOV 4 1986	Rec'd chk from appellant as payment for bill of costs. Returned same to appellant with note indicating that the check should be made payable to the US Treasury and forwarded to the attorney of record at DOJ once the mandate has issued in this appeal. Said check was returned 11/5/86.(ejc) (11/5/86)
NOV 10 1986	MANDATE ISSUED TO THE CLAIMS COURT. COSTS ALLOWED FOR $49.12 ak
NOV 26 1986	10. Ltr from petitioner, Irvin J. Huntzinger, informing the court that he will be representing himself pro se and asking the court if any further action is required by him, received. ejc(11/28/86)(SD-11/28-M-C (APPEARANCE OF HUNTZINGER ENTERED PER FXG 11/28/86) (ejc)
NOV 26 1986	11. Ltr from petitioner entering his appearance as pro se along with his "Motion Leave of the Court to File Rehearing in Banc," received (SD-11/28-M-C) (ejc) (11/28/86 LEAVE TO FILE OUT OF TIME IS GRANTED) (per fxg) (ejc) (12/2/86)
DEC 2 1986	PETITION FOR REHEARING IN BANC filed by appellant. mym DECLINED: 1-8-87. mym
DEC 4 1986	Petition for rehearing in banc vote sheet circulated. mym

DEC 16 1986	12. Appellant's motion for publication of the opinion in this appeal, filed. (SD-12/18-M-C (ejc) (12/18/86) DENIED: 12/23/86 per GA(df 12/23/86)
DEC 16 1986	13. Ltr from appellant with attachement of questions to the Clerk received. (SD-12-18-M-C) (ejc) (12/18/86)
DEC 18 1986	14.Ltr to appellant responding to his ltr of 12-11-86. Canceled. See no.17
DEC 22 1986	15. Ltr from Richard A. Graham requesting to withdraw as counsel Mr. Huntzinger, filed. (ejc) (12/24/86) GRANTED: 1/6/87 per fxg) (ejc)(1/7/87)
DEC 29 1986	16.Petitioner's request for an extension to file an amendment to original rehearing in banc (to & including 1/10/87) & to also submit a brief, filed. (bam) (12/30/86)
JAN 8 1987	17.Ltr to appellant responding to his ltrs of 12-11-86 & 12-24-86, enclosing order declining petition for rehearing in banc&rules. mym
JAN 12 1987	18.Appellant's "Notice of Appeal" appealing the decision of this to the US Supreme Court, received. (ejc) (1/14/87) (No action required per fxg 1/14/87) (ejc) (1/14/87)

IN THE UNITED STATES OF APPEALS
FOR THE FEDERAL CIRCUIT

IRVIN J HUNTZINGER	Appeal No 86-798
Appellant	Appeal frm the US ClCt
v.	Case No. 317 - 85 C
THE UNITED STATES,	
Appellee.	

NOTICE OF APPEAL

NOTICE of PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES, is hereby given that IRVIN JAMES HUNTZINGER, Appellant above named, hereby appeals decision of the United States Court of Appeals for the Federal Circuit DECIDED: October 20, 1986, affirmed on the basis of the Claims Court's opinion, "summary judgment of the United States Claims Court dismissing his complaint" basis motion moved by the Defendant -- untimely filing, six year statute of limitations, OPINION, filed Oct 23, 1986; and, United States court of Appeals for the Federal Circuit, Appeal ORDER no. 86 - 798, "suggestion for rehearing in banc have been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined." 8 JAN 87.

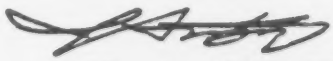
Appellant filed, pro se, in U.S. Claim Court & "rehearing in banc."

DATED: 9 January 1987

BY: IRVIN JAMES HUNTZINGER
18 Tree Haven Lane
Stafford, VA 22554-9251
Phone: (703) 752-1060

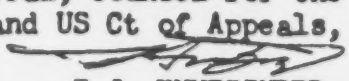
CERTIFICATE OF SERVICE

I certify that I have this 26th day of March deposited in the United States Mail 2 copies of this document with Appendix to Respondent and copy furnished Claims Court and Court of Appeal.



I. J. HUNTZINGER
Pro se

I certify that I have this ____ day of May 1987 deposited in the U.S. Mail, first class, postage prepaid corrected copies of this "Petition for Writ of Certiorari to the: Solictor General; Counsel for the Respondent, Mr John S. Groat and US Ct of Appeals, address(s) of record.



I.J. HUNTZINGER
Pro se

Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1801

In the Supreme Court of the United States

OCTOBER TERM, 1986

IRVIN JAMES HUNTZINGER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Cases:

Bonen v. *United States,* 666 F.2d 536 (Ct. Cl. 1981), cert. denied 456 U.S. 991 (1982) 6

Brundage v. *United States,* 504 F.2d 1382 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975) 6

Eurell v. *United States,* 566 F.2d 1146 (Ct. Cl. 1977) 5

Friedman v. *United States,* 310 F.2d 381 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963) 6

Heisig v. *United States,* 719 F.2d 1156 (Fed. Cir. 1983) ... 5

Pacyna v. *Marsh,* 809 F.2d 792 (Fed. Cir. 1986), cert. denied, No. 86-1136 (May 18, 1987) 6

Ramsey v. *United States,* 215 Ct. Cl. 1042 (1978), cert. denied, 439 U.S. 1068 (1979) 6

Soriano v. *United States,* 352 U.S. 270 (1957) 5

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1801

IRVIN JAMES HUNTZINGER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was wrongfully removed from active duty in the Army in 1960. The decision below, which rejected petitioner's challenge as untimely filed, is correct, it does not conflict with any decision of this Court or of any other court of appeals, and it presents no significant legal question. Accordingly, review by this Court is not warranted.

1. Petitioner served in the United States Army Air Corps from 1946 through 1956. In January 1957, he was honorably discharged from enlisted service in the Army and entered active duty as a second lieutenant in the United States Army Reserve. Following the receipt of several sub-standard Officer Efficiency Reports (OERs), petitioner was released from active duty in June 1960. Pet. App. 39-44.

In 1962, after his release from active duty, petitioner was promoted to the grade of captain in the Army Reserve. In 1968, he returned to active duty for a 296-day limited tour. During this limited duty tour, petitioner was found to be medically unfit for further active duty service due to a heart condition. After a number of evaluations

and appeals, the Army again released petitioner from active duty and in 1970 placed him on disability retirement at a 30% disability rating. Pet. App. 45-46.

In 1969, prior to his disability retirement, petitioner began the first of a continuing series of petitions to the Army Board for the Correction of Military Records (the Board). In his first petition, petitioner sought to have three unfavorable OERs removed from his personnel file. The Board reviewed his records and denied the application. In 1970, petitioner applied to the Board seeking promotion to the rank of major. After considering his application and record, the Board transferred petitioner to the Retired Reserve in the grade of major, but without entitlement to retired pay in that higher grade, pursuant to 10 U.S.C. 1371. Pet. App. 47-48.

In July 1979, petitioner applied to the Board for reconsideration of his 1969 and 1970 applications. That request was denied in May 1980. In December 1981, petitioner again requested reconsideration of his 1969 application. The Board denied that request in July 1982. In 1983 and again in 1985, petitioner applied to the Board challenging his 1960 release and requesting promotion to colonel and punitive damages. The Board denied both requests, noting on the second occasion that the application was untimely since petitioner had been aware of the alleged error or injustice since 1960. Furthermore, the Board noted, the passage of 25 years made the relief petitioner requested impractical. Pet. App. 47-48.

2. In May 1985, petitioner filed this suit under the Tucker Act, 28 U.S.C. 1491, in the United States Claims Court challenging his 1960 removal from active duty and his 1970 disability retirement. He sought (1) retroactive reinstatement to active duty at the grade of first lieutenant effective June 24, 1960; (2) constructive promotion to the grade of colonel effective July 3, 1981; (3) recovery of all

back pay, allowances, accumulated benefits and entitlements since June 24, 1960; (4) correction of his 1958-1959 OERs; (5) a setting aside of his 1970 disability retirement; and (6) punitive damages. Pet. App. 49.

The Claims Court granted summary judgment for respondent, concluding that all of petitioner's claims were untimely filed. The court noted that the statute of limitations governing claims over which it has jurisdiction, 28 U.S.C. 2501, bars every such claim unless the complaint is filed within six years after the claim first accrues. Petitioner's claims centered on two separate events, his release from active duty on June 24, 1960, and his subsequent physical disability retirement from the Army Reserve on October 1, 1970. Pet. App. 50 & n.1.

Addressing first petitioner's claims concerning the 1960 discharge, the court stated: "It is well established that a cause of action for back pay and allowances based on an alleged unlawful military discharge first accrues, and accrues all at once, on the date of discharge" (Pet. App. 51). Thus, any claims relating to that discharge accrued on June 24, 1960, much more than six years before the filing of the complaint. The court rejected petitioner's contention that the statute of limitations was tolled by his continual pursuit over a 25-year period of his administrative remedies through petitions to the Correction Board. "The Court of Claims has long held that resort to permissive administrative procedures such as a petition to a corrections board does not toll the statute." Pet. App. 53.

The court also considered at some length (Pet. App. 54-60) and decisively rejected petitioner's contention that the government had concealed material information from him at the time of his 1960 discharge, material that he allegedly uncovered only recently pursuant to the Freedom of Information Act. The court concluded that the Army in 1960 had fully and accurately notified petitioner of the grounds for his discharge, finding that petitioner's con-

trary assertion "strains credulity" (Pet. App. 59). The court went on to state (*id.* at 60):

> It is clear from the record that the Army did not conceal any critical facts that would keep the plaintiff from knowing that he had a claim against the Army on June 24, 1960, the date of his discharge from active duty. Plaintiff was aware at the time of his discharge of the reasons why he was discharged.

Turning to petitioner's claims relating to his 1970 disability retirement, the court found it "clear from the context of the complaint" that petitioner meant those claims to be conditional. That is, "he only wants such relief if the Court were willing to void his 1960 discharge and place [him] back on active duty. Conversely, he does not want his disability retirement pay tampered with if the Court denies his request for reinstatement." Pet. App. 61. In any event, the court noted, these claims all accrued in 1970, at the time of the disability retirement, and were therefore also untimely (*id.* at 62).

The Court of Appeals for the Federal Circuit affirmed in an unpublished per curiam opinion (Pet. App. 3-4). The court of appeals noted that the Claims Court had dismissed the case as barred by the statute of limitations. "Finding no error in that decision, we affirm on the basis of the Claim Court's opinion" (*id.* at 4 (emphasis omitted)).

3. Petitioner reiterates his contention (Pet. 29-40) that the statute of limitations should have been tolled on his 1960 wrongful discharge claim because the Army assertedly concealed material information from him concerning the true reasons for that discharge. This contention was fully considered and properly rejected by the Claims Court, and its decision was in turn affirmed by the court of appeals. Such a fact-bound and apparently frivolous claim does not merit this Court's attention.

Petitioner further contends (Pet. 40-47) that he is entitled to judicial review of decisions of the Correction Board denying his claims, and that his complaint was timely filed because at least a few of those decisions were less than six years old. Apparently, petitioner assumes (*id.* at 46-47) that he is entitled to such review under Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. (Supp. III) 702. That provision generally provides a cause of action for judicial review of final agency action. Section 702 explicitly states, however, that an action may be brought thereunder only if it is an action "seeking relief other than money damages." Because Section 702 does not waive sovereign immunity for actions seeking money damages, petitioner's cause of action for back pay, allowances, accumulated benefits, entitlements and punitive damages necessarily accrued at the time of his allegedly wrongful discharge in 1960. The APA cannot revive such a stale claim.

Nor can petitioner's continual resort to the Correction Board be said somehow to have tolled the statute of limitations. Jurisdiction in this case was expressly predicated on the Tucker Act. The Federal Circuit, which has exclusive appellate jurisdiction over all such claims (28 U.S.C. 1295(a)(2)), does not require a plaintiff to apply to a Correction Board before seeking money damages in court under the Tucker Act on a claim of wrongful discharge. See, *e.g.*, *Heisig* v. *United States*, 719 F.2d 1153, 1155 (Fed. Cir. 1983); *Eurell* v. *United States*, 566 F.2d 1146, 1147-1148 (Ct. Cl. 1977). Thus, petitioner's cause of action for money damages properly accrued at the time of the allegedly wrongful discharge and was not tolled by his pursuit of permissive administrative remedies. *Soriano* v. *United States*, 352 U.S. 270, 273 (1957); *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953).

To permit a person seeking to challenge his discharge to revive a stale claim for money damages by the simple expedient of applying first to the Correction Board, and then, following a denial of his claim by the Board, bringing a Tucker Act suit, would effectively eliminate the statute of limitations as a bar to ancient claims for money damages. Over the past 25 years the Federal Circuit and its predecessor, the Court of Claims, have repeatedly rejected such attempts, and this Court has consistently declined to review those decisions. See *Pacyna* v. *Marsh,* 809 F.2d 792 (Fed. Cir. 1986) (Table), cert. denied, No. 86-1136 (May 18, 1987); *Bonen* v. *United States,* 666 F.2d 536, 539 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); *Ramsey* v. *United States,* 215 Ct. Cl. 1042 (1978), cert. denied, 439 U.S. 1068 (1979); *Brundage* v. *United States,* 504 F.2d 1382, 1385 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975); *Friedman* v. *United States,* 310 F.2d 381, 396-403 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JUNE 1987

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CASE No. 86 - 1801 (3)

Supreme Court, U.S.
F I L E D
JUN 24
JOSEPH F. SPANIOL, JR.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

IRVIN JAMES HUNTZINGER, Sr.,
Petitioner,

v.
UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONER'S **REPLY BRIEF** TO THE --- MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In The Supreme Court of the United States

October Term , 1986

No. 86-1801

Irvin James Huntzinger, Sr., Petitioner

v.

United States of America

On Petition for a Writ of Certiorari to

The United States Court of Appeals

For the Federal Circuit

REPLY BRIEF

MEMORANDUM FOR THE UNITED STATES

IN OPPOSITION

The record clearly discloses that Petitioner was not furnished with the proper basis for his relief from active duty on 24 June 1960. Petitioner only obtained the correct basis for his relief after an extremely diligent effort over a period of 19 years when, in 1979 and 1980, the Army finally released

classified documents to Petitioner which formed the basis for this action.

The United States cannot assert a bar based on the statute of limitations when, itself, is guilty of wrongdoing. The trusted defendant standard should be applied in this case and not penalize citizens for their trust in government. (See Yale Law Journal, Vol 95, Issue 7, "Citizen Trust and Government Cover-Up," p. 1477). Law emanates from the people who will not tolerate dishonesty, fraud or concealment by its elected representatives and government officials. The Court is the final arbitrator in these disputes and must side with the people, i.e. Petitioner, especially when the Petitioner did not know the basis of his claim until 1979.

Further, Petitioner has stipulated waiver of his right to money damages which would allow jurisdiction under Section 702, of the Administrative Procedure Act, 5 USC (Supp. III) 702.

Respondent's recommendation to deny Petitioner's request for writ contains indubitable - inducement in error of fact by inference diverting attention from the issue(s)/questions posed to this Honorable Supreme Court, such as, Petitioner was retired (disablity) for "Heart Disease", which simply is not true. Pertinent, in fact, HQ, Department of Army denied rating for heart condition.

The "true" IG elimination record was not knowledgeable to Petitioner by Respondent's failure to notify upon "completion" of findings and recommendations in accordance with their regulations, U.S. statutes and procedural due process.

Petitioner was illegally, wrongfully and fraudulently "for cause" eliminated under "sham" of "annual screening" AR 135-173 on the basis of several ER's received in one unit sustained by IG, *(Reviewed at HQs DA as bias, prejudiced with forgone conclusions)* where confusion, chaos, conspiracy existed. See

"sworn testimony" of MG Hayden Boatner (App 121) without "due process" in violation of Respondent's regulations, federal statutes and denial of "due process" guaranteed by his constitutional bill of rights; and non-compliance with UCMJ, and USC 10 Sec 5706.

Respondent classified his illegal actions within "sequestered" IG records thereby priviledged (APX P-233) communications by US Statute and not discoverable by diligence or otherwise available to Petitioner unless informed by the Respondent as required by his regulations (APX P-234), thereby the exception "tolling" the statute of limitations until discovery June 1979 through cover-up, fraudulent, illegal and wrongful Board action, violation of 10 USC Sec 5706, fraudulent concealment, hidden in the IG "sequestered" records pursuant to UCMJ (APX P-262).

The Court(s) below decided on "summary judgement" untimely filed and "decisively rejected petitioner's contentions that

the government concealed material information...") The court concluded that the Army in 1960 had fully and accurately --- "strains credulity (Pet. App. 59). The Solicitor General further quotes the Court:

> "It is clear from the record that the Army did not conceal any critical facts that would keep the plaintiff from knowing that he had a claim against the Army on June 24, 1960, the date of his discharge from active duty. Plaintiff was aware at the time of his discharge of the reasons why he was discharged."

(This is an assumption unsubstantiated and not true. "Fabricated by DA-JAG and BCMR).

Peti toner's records are full of documents that confirm violation of procedural regulations that show concealment and fraud. No consideration is given a fact finding hearing. Only the BCMR and Court's verstions, without ascertaining the truth "strains

credulity". However the records clearly states the withholding of information, concealment and fraudlent action by the Respondent's records showing positive "coverup"; not logical, and logically flawed that Petitioner should have known. Records contain evidence, pertinent, material concealment, disposed safeguards in records, disregarded by Courts without hearing is incredible; pertinent, fact Court opinion:

> "In order to successfully toll the statute of limitations under a concealment theory, courts have required plaintiffs to plead affirmatively and to show deceptive or fraudulent concealment that induces justifiable reliance and delay in bringing an action. See Ocean S.S. Co v. US - (P. Apx P-055).

So pleaded by the Petitioner based on Respondent's records. Therefore, it is inconceivable that the Courts would grant a "Summary Judgement" without hearing Plaintiffs pleading of "illegal, wrong-

ful, fraudulent" separation; documented, concealed within "sequestered" IG records until discovery June 1979. Litigation was filed within six year statute of limitations and further denial of Petitioners' rights to admission, discovery and depositions to prove the fraudulent concealments is credulous; with all evidence of "concealment" support of Petitioner's claim.

The quoted response to interrogatories of 11 September 1959; as for to Petitioner's knowledge were accepted, unfounded allegations dismissed by HQs DA as he was informed his separation was based on "annual screening" qualified (AR 640-98) records by ADB.

This claim was filed within six years of Petitioner gaining knowledge, June 1979.

Administrative remedies before the BCMR were for other reason(s) through 1981, i e., OERs. A separate and distant action since Petitioner was unaware of the concealment, illegal, fraudulent

separation actions until 1979.

Therefore, it is prayed for that Respondent's request of denial of petition not be granted; and, this Honorable Supreme Court grant Writ of Certiorari guaranteeing members of the Armed Forces their "constitutional due process"; by far, not a "frivolous claim" by Respondent's intentional violation of their regulations, federal statutes, and the "soldier's" constitutional rights which he defends with his life in war and peace.

The time is ripe for the Supreme Court to evaluate the on-going goverment concealments, and cover-up of fraudulent actions hidden in classified and/or sequestered diversified records among the bureaucracy by intentional bureaucratic means, at the expense of the general public.

The question(s) proposed to this Supreme Court are of Constitional dealing with the rights and liberties of individuals, and focusing on protecting

property rights which this Court is the final arbitor and these laws of the land have unquestioned with "conflicting opinions" and review is warranted.

Dated: 19 June 1987

BY: IRVIN JAMES HUNTZINGER, Sr.

Pro se

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

IRVIN JAMES HUNTZINGER, Sr., PETITIONER	)	
	)	
v.	)	No. 86-1801
	)	
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

I hereby certify that I have deposited copy(s) of this document, postage prepaid, FIRST CLASS, U.S. Mail this 19th June 1987 TO:

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